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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 661

C. B. KING, JOHN H. GERKEN AND
M. F. PAFFORD,

Petitioners

vs.

J. BRADLEY STREIT AND
A. W. WALLACE,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

CLAUDE PEPPER,
Cafritz Building,
Washington, D. C.

W. G. WARD,
Du Pont Building,
Miami 32, Florida.

T. J. BLACKWELL,
First Federal Building,
Miami 32, Florida.

Attorneys for Petitioners.

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J. BRADLEY STREIT AND
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Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

C. B. King, John H. Gerken and M. F. Pafford pray that a writ of certiorari may issue to review the orders, judgments, and decrees of the Supreme Court of Florida, and of the Circuit Court of Dade County, Florida, in a cause in said courts lately pending, designated initially as Chancery Suit No. 133703, wherein J. Bradley Streit and A. W. Wallace were plaintiffs and petitioners C. B. King, John H. Gerken and M. F. Pafford were defendants, as to the following:

1. An order entered in the Supreme Court of Florida on January 8, 1951, denying the application of these

petitioners for a writ of certiorari to review a Circuit Court order in said cause (R. 30).

2. The order of the Supreme Court of Florida entered on February 5, 1951, denying petitioners' application for a rehearing as to the foregoing (R. 35).

3. The judgment and decision of the Supreme Court of Florida on an appeal by J. Bradley Streit and A. W. Wallace, as appellants, against petitioners as appellees, entered on August 24, 1951, reversing a final decree in favor of petitioners previously entered in the Circuit Court of Dade County, Florida (R. 202).

4. An order of the Supreme Court of Florida, entered on November 6, 1951, denying petitioners' application for rehearing with respect to the foregoing (R. 222).

5. The second final decree of the Circuit Court of Dade County, Florida, as entered without hearing on November 15, 1951 (R. 252).

7. The order of the Supreme Court of Florida, as entered on December 20, 1951, denying petitioners' application for rehearing as to the foregoing (R. 278).

8. The order of the Supreme Court of Florida as entered on December 19, 1951, denying petitioners' second petition for review of proceedings below on writ of certiorari (R. 307).**

6. The order of the Supreme Court of Florida, as entered on November 27, 1951, dismissing the first and only appeal of C. B. King, John H. Gerken and M. F. Pafford, as appellants, against J. Bradley Streit and A. W. Wallace, as appellees, this being petitioners' appeal to the Supreme Court of Florida from the final decree of the Circuit Court of Dade County entered on November 15, 1951 (R.273).

OPINIONS BELOW

The case was tried, as an equity proceeding, before the Circuit Judge, without jury. His findings of fact and conclusions of law are set forth in an opinion (R. 195). The opinion of the Florida Supreme Court on the first appeal, that is, upon the only hearing granted by the Supreme Court of Florida in this case, is reported in the Advance Sheets for the Southern Reporter for November 22, 1951, No. 8, 54 So. 2d 522.

The Supreme Court of Florida is the highest court of the State. The Circuit Courts have exclusive original equity jurisdiction, and the Florida Supreme Court has appellate jurisdiction. The right to an appeal from an adverse final decree is guaranteed by the Florida Constitution.

STATEMENT

On or about February 8, 1950, Messrs. King, Gerken and Pafford, petitioners, entered into a letter agreement with Mr. J. Bradley Streit, of Toronto, Canada, respondent, with respect to the proposed sale of "approximately 440,000" shares of the capital stock of Maule Industries, Inc., a Florida corporation, having its principal place of business in the City of Miami, along with certain first mortgage bonds of the company. The agreement was an informal one, induced by a promissory representation made by the proposed purchaser that he was a retiring capitalist who wished to purchase the stated securities as a permanent investment and would work out with the sellers, Messrs. King, Gerken and Pafford, an arrangement whereby and whereunder they would be maintained in the management-control of the company, as they previously had been.

At the time, C. B. King was the owner and holder of 44,534 shares of the stock; John H. Gerken was the owner and holder of 52,781 shares thereof; and M. F. Pafford was the owner of 39,084 shares. In other words,

the petitioners together owned 136,399 shares of the stock of Maule Industries, Inc. The stock of that company authorized was 800,000 shares and there were 783,524 shares outstanding, and Mr. Streit was fully informed of all of the foregoing. He was advised that petitioners, jointly, had the voting control of stock in the company owned by others, namely, by Kathryn C. Maule, who owned 91,453 shares; Kathryn M. King, who owned 48,295 shares; Helen King Tellekamp, who owned 11,500 shares; Charles King, Jr., who owned 11,500 shares; Eleanor Gerken, who owned 117,295 shares; and Blackwell, Walker & Gray, who owned 15,000 shares. Petitioners also had the voting control, at the moment, of 9,500 shares of the stock of the company, owned by the estate of John H. Gerken, Sr., deceased, which estate was in process of administration, the stock being subject to immediate sale for the payment of expenses of administration and for distribution. The figure of 440,000, approximately, was thus arrived at, and it was contemplated that petitioners could acquire the 295,043 shares owned by the individuals named, plus the 9,500 shares owned by the estate of John H. Gerken, Sr., in the event the respondent, Mr. Streit, exercised the option within the time provided, i.e., prior to March 10, 1950. Also, there was available for purchase a reasonably large amount of this stock, owned by parties other than the persons here named. One block of such stock, amounting to about 200,000 shares was sold for $2.50 per share after February 8, 1950.

Shortly after the date last mentioned, petitioners, the proposed sellers, were informed through divers sources, that the optionee, Mr. Streit, had wilfully mislead them as to his intentions and that he intended after gaining control of the company to immediately cause a large increase in the dividend rate and thereby to speedily enhance the market price of the stock; and, thereupon, to dispose of the stock, under such conditions that the management of the company would necessarily pass out of the hands of the petitioners, contrary to the agree-

ment. Petitioners learned, further, that Mr. Streit had available no funds for investment in the stated securities and that he had made arrangements through a New York stock brokerage concern, J. P. Allen & Co., for the financing and marketing of the Maule securities, on a promotional basis.

The letter agreement referred to was, as stated, in the nature of an option. The optionee paid $10,000.00 as consideration therefor. It was to be effective until March 10, 1950, but long prior to that date, disputes and disagreements arose, on account of the false representations mentioned, and mutual dissatisfaction obtained.

The option letter (R. 12-13) reads as follows:

"February 8th, 1950

"Mr. J. Bradley Streit
Miami Beach, Florida

Dear Sir:

We acknowledge receipt of your check in the amount of $10,000.00 to apply on the purchase of approximately 440,000 shares of the capital stock of Maule Industries, Inc., at a net price of $2.75 per share and first mortgage bonds of Maule Industries, Inc. in an amount to be determined within fifteen days at a price of par plus interest to date of transfer.

CBK MFP

JHG JBS

It is understood and agreed that you will deposit with the Miami Beach First National Bank, Miami Beach, Florida, sufficient funds to pay for the above listed securities on or before March 10th, 1950, at which time the transaction is to be closed, and you are to have the right to elect a majority of the board of directors.

In the event you fail to make payment for the above securities on the above date, the $10,000.00 deposit mentioned in your letter is to be forfeited as liquidated damages.

Yours very truly,

(Signed) C. B. King
C. B. KING

(Signed) John H. Gerken
JOHN H. GERKEN

(Signed) M. F. Pafford
M. F. PAFFORD

On the night of March 9, 1950, just prior to the expiration of the option agreement, the petitioners and the optionee, Mr. Streit, got together, in conference, and agreed to terminate and extinguish the option. It was agreed that the optionee should execute unto petitioners a release, and that the petitioners should return to Mr. Streit the $10,000.00 paid as consideration for the option. That agreement was carried into effect. Mr. King, acting on behalf of the petitioners, executed to Mr. Streit his check for $10,000.00, as a return of the consideration, and that check was accepted and cashed by Mr. Streit. He, the respondent, executed, as a consideration therefor, an unconditional release (R. 18-166) of the original option, the release being in words and figures as follows:

"3/9/50

Receipt is hereby acknowledged of check of C. B. King for the sum of Ten Thousand ($10,000.00) Dollars and payable to the order of J. Bradley Streit. This check is received by the undersigned as the return to him of a like sum delivered in connection with sales agreement dated Feb. 8th, 1950, wherein C. B. King, John Gerken and M. F. Pafford agreed

to sell to the undersigned shares of stock of Maule Industries, Inc., which said agreement has by mutual consent of all parties concerned, been cancelled and declared of no further force and effect.

The undersigned, in consideration of the return of the sum of $10,000.00 (check of C. B. King) as set forth aforesaid does hereby expressly declare the said agreement of Feb. 8th, 1950 to be cancelled and of no further force and effect and does further forever release and discharge the said M. F. Pafford, C. B. King and John Gerken of and from any and all duties and obligations thereunder.

The undersigned does further warrant unto Messrs. Pafford, King and Gerken, that he has not assigned the said contract of Feb. 8th and is the sole owner thereof.

/s/ J. Bradley Streit."

At the time, Mr. Streit was still interested in attempting to negotiate the purchase of a certain amount of Maule Industries, Inc., stock. The petitioners as optionors were, however, unwilling to arrange for a sale of the stock, or any considerable quantity of stock, except upon condition that it be put in a voting trust, for their benefit, to the end that their management-control of the business might be retained. Accordingly, on the night of March 9, 1950, and in furtherance of new negotiations, a second option agreement was entered into between Messrs. King, Pafford and Gerken, as optionors, and between J. Bradley Streit and A. W. Wallace, (Mr. Wallace being a new party), for the proposed sale of 300,000 shares of Maule Industries stock, but upon condition that a voting trust agreement be worked out along the lines above mentioned and agreed upon. The second option agreement (R. 128) was in words and figures as follows:

"March 9, 1950

"Mr. A. W. Wallace and
Mr. J. Bradley Streit

Gentlemen:

We agree to sell to you on or before July 1, 1950 approximately three hundred thousand (300,000) shares of Maule Industries, Inc. stock at a price of $2.75 per share payable in cash at time of closing.

This agreement to sell to you the aforesaid stock is made with the understanding that the stock will be voted by a voting trust—the terms of which shall be along the lines discussed at tonight's conference and shall be mutually agreeable to you and ourselves. The voting trust shall be formally entered into simultaneously with our sale of said stock.

The consideration for this agreement is the cancellation of agreement dated Feb. 8th, 1950, by J. Bradley Streit—which agreement has been cancelled by separate instrument.

/s/ C. B. King
/s/ John H. Gerken
/s/ M. F. Pafford."

The second option agreement was entered into in good faith by the petitioners and they of course expected to carry it out. However, shortly afterward they were informed by Mr. Wallace that he had interviewed a friend, reportedly a member of the Securities Exchange Commission, who had informed him that a voting trust agreement of any kind, in connection with the proposed purchase, would be highly undesirable from the standpoint of the purchaser. He thereupon proposed, on his own behalf and on behalf of Mr. Streit, that the second option agreement be amended in such manner as to eliminate therefrom all reference to the proposed voting

trust agreement. The petitioners declined to consider such an amendment, and after various exchanges between the parties, they were told that the optionees, Streit and Wallace, would proceed with the agreement but that they would demand a voting trust agreement under which Streit and Wallace, or their appointees, would control the voting of the stock; and that would have of course defeated the purpose of the voting trust. The voting trust was, in the first place, intended for the benefit of the petitioners, only, to insure their management-control of the business, and the proposed modification would have destroyed the effectiveness of and the reason for the voting trust agreement. Discord thus came about and a voting trust agreement was never formulated. There would have been no difficulty in arriving at the terms of a voting trust agreement but the only purpose of such an agreement is with respect to the control of the voting of the stock involved, and as the optionees made it manifest that they would not consent to the voting control being placed in the hands of Messrs. King, Pafford and Gerken as was originally agreed upon, the plan was frustrated.

Streit and Wallace then filed in the Circuit Court of Dade County, Florida, a bill in equity (R. 12) for the specific performance of either the first option agreement or the second option agreement. In their bill of complaint, they made no reference to the fact that they had executed unto King, Pafford and Gerken a complete and unconditional release of the first option agreement and had received a return of the $10,000.00 consideration therefor. They did not allege that King, Gerkin and Pafford owned the Maule Industries stock involved and as a matter of fact, they did not own it, as the optionees well knew. The optionors owned a part of the stock, but a much larger part of it was owned by the widow and descendants of E. P. Maule, the founder of the business and King, Gerken and Pafford had voting control only, as above fully set forth. It was contemplated, however, when the option agreements were made

then the optionors would obtain the consent of the owners of the stock to the sale, provided management of the business did not pass out of the hands of the petitioners.

At any rate, as the bill of complaint (R. 12) did not allege ownership of the stock in King, Gerken and Pafford, they moved to dismiss the bill (R. 16-17) for want of equity. The motion was denied, however, and they thereupon filed a motion for summary judgment, attaching a detailed affidavit (R. 20-23) of the facts of the transaction. Streit and Wallace did not file an opposing affidavit for they could not, in fact, contest the statements made in the affidavit. Therefore, the said statements stood (and continue to stand) as true and correct, and as unchallenged. Nevertheless, the Circuit Judge saw fit to deny the application for summary judgment and the optionors then went to the Supreme Court with an application for review, on certiorari. The Supreme Court of Florida, on the same day that the application was made, summarily denied it (R. 29) and sent the case back to the Circuit Court of Dade County for the taking of testimony.

After the case was returned to the Circuit Court of Dade County, the Judge to whom it had been originally assigned, re-assigned (R. 36) it to another Judge, without apparent reason. The matter then came before the second Judge who reviewed the record and upon finding in the answer of the optionors, and in their affidavit for summary judgment, undisputed showing that the first option had been cancelled and released by mutual consent, with a return of the consideration therefor, announced that in his opinion the original option had been rescinded and discharged, and was entirely extinct. He took note of the fact that the optionees, as paintiffs, had not charged the optionors with any fraud, overreaching or misconduct of any kind or character in connection with the rescission and cancellation of the first option, and so stated emphatically he could see no

ground for relief thereunder. He also stated that inasmuch as the parties had been unable to agree as to the terms and conditions of the voting trust, under the second option, there had been no meeting of mind and so the second option apparently could not be enforced, under Florida law (R. 225). Such a conclusion as that stated could hardly be avoided in view of the decisions of the Florida Supreme Court on the subject, including the Rule announced in Jones v. Toms, 9 So. 2d 96. However, the second Judge announced that he would be obliged to take testimony, in view of the state of the record at that time, and so the matter proceeded.

In view of the announcements of the second Judge, at pretrial conference, as aforesaid, it was a foregone conclusion that the optionees, as plaintiffs, could not prevail. However, in delineating the issues to be tried and conducting the trial, (which took place before the second Judge, without reference to a Master and without a jury), procedural errors were committed against the defendants, King, Pafford and Gerken. Those errors, relating to the issues of fact to be tried, as to evidence and as to procedure, were no doubt induced by the conclusions of the Judge, already arrived at. Nevertheless, the defendants were "hamstrung" in the proceedings; but, at the conclusion, the second Judge made a finding to the effect that the parties had not been guilty of any fraud (defendants-petitioners not even having been charged with any); that the first option was rescinded and discharged, by mutual agreement and by reason of the release and the return of the consideration; that, in view of the foregoing, the option agreement between King, Gerken and Pafford, as optionors, and J. Bradley Streit, as optionee, dated Feb. 8, 1950, could not be enforced; and that the second option agreement was too indefinite for enforcement, particularly in view of the Florida Statute of Fraud (Sec. 725.02, Florida Statutes), which requires that a contract for the sale of stock must be in writing, and that the "memorandum" or writing, to be sufficient under the Statute of Frauds, would be

required to satisfactorily show that the terms and conditions of the voting trust arrangement had been agreed upon; consequently, there was no valid, binding or enforceable second option.

After a final decree (R. 195-199) in favor of King, Gerken and Pafford was entered, Streit and Wallace appealed to the Florida Supreme Court, and that Court, in a conscience shocking decision, without referring to the release and rescission of the first agreement and the return of the consideration thereof, held (R. 202) that Streit and Wallace could (1) enforce the first option and require King, Gerken and Pafford to deliver 440,000 shares of Maule Industries stock, together with the bonds; or (2) they might continue to negotiate with King, Gerken and Pafford, under the second option agreement, as to the voting trust arrangement, and if the optionors did not "negotiate in good faith" then (3) Streit and Wallace could, at their election, require the optionors to deliver to them the 300,000 shares of Maule Industries stock, without a voting trust agreement. Stated differently, the court gave Streit and Wallace their choice of three contracts.

Respondents' Bill of Complaint for Specific Performance (R. 12) had been at no time amended. It at no time presented an issue as to the validity of the general release of the option. There was neither pleading nor evidence to support an attempt to vary its terms by parol, if such variance could be permitted. There was no adjudication, or attempted adjudication, that the release was void. The court undertook to do indirectly what it manifestly could not do by direct action. It sustained a "claim" that had not been advanced by any pleading and as to which no issue existed, without notice to petitioners and without giving petitioners an opportunity to be heard in opposition thereto, by the simple expedient of ignoring the release instrument. The rules were violated; rules always recognized as fundamental and essential to due process and fair play.

Not only did the Florida Supreme Court ignore the rescission, cancellation and formal release of the first "option", but it purported to say that the decree of the Circuit Court should be reversed because King, Gerken and Pafford had refused (or had failed) to negotiate with Streit and Wallace concerning the "voting trust" called for by the second "option". As to that declaration, the Florida Supreme Court ignored the findings of fact of the Circuit Judge and disregarded the facts disclosed by the record, which show that the voting trust agreement was intended solely for the benefit of King, Gerken and Pafford, to insure their management-control, whereas failure to agree concerning it, afterward, arose from the fact that Streit and Wallace insisted upon having the voting control thereunder.

As the Florida Supreme Court decision and opinion (R. 202) appeared to be in flagrant conflict with the Constitutional guarantee of Due Process of Law, intended to protect the citizen against arbitrary exercise of governmental power and to secure to all equal protection of the law, King, Gerken and Pafford petitioned (R. 206) for a rehearing. Their petition was denied (R. 222). The case then came back to the Circuit Court and King, Gerken and Pafford petitioned (R. 239) the Court for the entry of an order, as to procedure, under which they would be informed as to the issues to be determined and as to what election, or elections, the plaintiffs, optionees, would make. Their petition was, however, summarily denied (R. 249), and a decree (R. 252) was immediately entered to the effect that King, Gerken and Pafford should produce and tender unto Streit and Wallace "440,000 shares" of stock (not approximately that number as the letter agreement specified), and also the bonds. That decree was entered in such manner as to specify the day and hour as to which the tender would be made, and it was under threat of the commitment of King, Gerken and Pafford for contempt, upon their failure.

King, Gerken and Pafford were denied an oppor-

tunity to show that they were not, at the time of the entry of the decree, the owners of 440,000 shares of stock in Maule Industries. They had, in fact, never been the owners of more than a fractional part of that amount, as Streit and Wallace well knew, from the outset. However, they were confronted with the necessity of acquiring and producing that amount of stock, and of bonds, or of being committed to jail under the provisions of Equity Rule 67 (which is also a Florida Statute), containing the following:

> "* * * If the decree be for the performance of any specific act, as, for example, for the execution of a conveyance of land or the delivering up of deeds or other documents, the decree shall, in all cases, prescribe the time within which the act shall be done, of which the defendant shall be bound, without further service, to take notice; and upon affidavit of the plaintiff, filed in the Clerk's office, that the same has not been complied with within the prescribed time, the clerk shall issue a writ of attachment against the delinquent party, from which, if attached thereon, he shall not be discharged, unless upon a full compliance with the decree and the payment of all costs * * *".

Upon the entry of that decree, King, Gerken and Pafford appealed to the Florida Supreme Court. They had not appealed at any earlier time and had had no opportunity to present questions as to errors committed against them and were entitled to appeal under the provisions of Florida Supreme Court Rule 11 (c), reading as follows:

> "Cross Assignments of Error by Appellee. The appellee may include cross assignments of error with his directions, but the failure of an appellee to file cross assignments of error shall in no event be construed so as to prevent him from thereafter appealing from an adverse ruling."

However, the Florida Supreme Court within six

days after the appeal was taken summarily dismissed it, without briefs having been filed and without King, Gerken and Pafford as appellants, ever having been heard.

King, Gerken and Pafford then being confronted with the necessity of procuring stocks and bonds sufficient to meet the requirements of the decree, proceeded to procure the same from their businss associates, business friends and from members of their families, and tendered same into court under protest, and with an affidavit statement (R. 283-298) as to the ownership The protest and affidavits of ownership were disregarded by the Circuit Judge, however, who stated that he was acting under compulsion of the mandate of the Florida Supreme Court, and he directed (R. 290-302) that all of the securities be turned over to Streit, in exchange for a cashier's check, which the Circuit Judge now holds.

After the order was entered by the Circuit Judge, directing the Clerk to turn over to Streit the stocks and bonds owned by Kathryn C. Maule, Kathryn King, Eleanor Gerken, Helen Tellekamp, and others, Messrs. King, Gerken and Pafford again went to the Supreme Court of Florida for relief, by way of petition for a writ of certiorari (R. 281) to quash the order and to require a return of the third-party owned securities. Their petition was summarily denied (R. 307).

Afterward, when the officers of Maule Industries, Inc., failed to transfer the stock, owned by persons not parties to this litigation, on the books of the company, the Circuit Judge then cited (R. 311) King, Gerken and Pafford for contempt of court, under the Rule and Statute above cited and compelled them to effect a transfer.

This is a case in which the contract rights of King, Gerken and Pafford have been arbitrarily disregarded;

accepted forms of law have not been observed; King, Gerken and Pafford have been arbitrarily discriminated against; and in at least three instances due process of law, in its procedural aspects, which requires notice and opportunity to be heard in an orderly proceeding adapted to the nature of the case, in accordance with established rules, has been wilfully and arbitrarily withheld from them. They have been repeatedly threatened with commitment to jail for failure to comply with orders that required no compliance insofar as King, Gerken and Pafford, in their individual capacities are concerned, under a rule and statute, above stated, which is in itself unconstitutional, for that it provides for the attachment and commitment of a citizen without hearing and as a routine procedure.

This is not a case in which the Courts of Florida have merely violated contractural rights; it is not a case which involves judicial error only; it is not a case in which King, Gerken and Pafford complain, merely, of lack of uniformity of judicial decision; but it is a case in which they have been deprived of a due course of legal procedure, such as has been established in our jurisprudence for the protection and enforcement of private rights. There has been evident throughout the proceedings a disregard for the due process and equal protection provisions of the Fourteenth Amendment, both procedurally and substantively. The case, as a whole, is a flagrant example of a misapplication of governmental power and of oppression.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257 (3) because of the denial by the Supreme Court of Florida of rights claimed by petitioners under the Constitution of the United States.

The First Federal Question

The first constitutional question within the Court's jurisdiction springs from petitioners' claim that cer-

tain orders and decisions of the Florida Supreme Court in the conduct of this case have deprived them of liberty and property without observing the procedural requirements of due process of law in violation of rights guaranteed to them by the Fourteenth Amendment to the Constitution.

The question arose upon the denial by the courts of Florida throughout the litigation of a hearing upon two of petitioners' defenses to respondents' suit for specific performance of an alleged option to sell 440,000 shares of the stock of Maule Industries, Inc.

The first of these was the defense that specific performance could not be granted because the agreement was made in contemplation of the fact that petitioners did not own or have authority to transfer this number of shares. This defense was never heard, although duly pleaded and repeatedly urged and although its sufficiency as a defense was never questioned. The deprivation of the right to hearing on this issue came about through a complicated series of proceedings:

(1) The decision (R. 20) of the Circuit Court of Dade County denying petitioners' motion (R. 16) to dismiss respondents' bill, based on failure of respondents to allege in said bill petitioners ownership of 440,000 shares of stock;

(2) Its denial (R. 29) of petitioners' motion for summary judgment (R. 23) based on affidavits of the parties' mutual understanding at the time of the option agreement (R. 24)

(3) The Florida Supreme Court's denial (R. 30) of certiorari from this Order;

(4) The action of the trial judge in restricting the hearing on the merits so as to exclude the issue of petitioners' ownership of stock; (R. 223)

(5) The reversal (R. 202) by the Supreme Court of the Circuit Court's decision (R. 199) for petitioners without provision for a hearing of issues not tried on the first hearing;

(6) The denial (R. 222) by the Florida Supreme Court of petitioners' petition (R. 206) for re-hearing urging modification to afford a hearing below on issues not heard, including that of stock ownership;

(7) The denial (R. 249) by the Circuit Court of petitioners' request (R. 239) for a procedural order requiring a hearing on this and other issues;

(8) The order (R. 252) of the Circuit Court requiring petitioners to deliver 440,000 shares of stock on penalty of punishment for contempt notwithstanding affidavits of non-ownership;

(9) The quashing (R. 273) by the Florida Supreme Court of petitioners' appeal (R. 272) arguing the failure to grant a hearing on this issue as a denial of due process in violation of the Fourteenth Amendment;

(10) Its denial (R. 278) of petitioners' petition (R. 278) for re-hearing of its order quashing this appeal re-urging the due process ground;

(11) Its denial (R. 307) of petitioners' petition (R. 281) for certiorari from the Circuit Court order requiring petitioners to deliver and transfer 440,000 shares of stock likewise protesting the denial of due process;

The second unheard defense was that the option agreement was unenforceable because induced by false and fraudulent representations. This defense, although likewise duly pleaded and repeatedly urged, and although its sufficiency as a defense was never questioned, was never heard. The following orders and decisions resulted in the denial of the right to a hearing on this issue:

(1) The action of the trial judge in the Circuit Court of Dade County in restricting the hearing on the merits so as to exclude the issue of the defense of fraud in the inducement (R. 223);

(2) The reversal (R. 202) by the Supreme Court of the Circuit Court's decision (R. 195-199) for petitioners without provision for a hearing of issues not tried on the first hearing;

(3) The denial (R. 222) by the Florida Supreme Court of petitioners' petition (R. 206) for re-hearing urging modification to afford a hearing below on issues not heard, including that of fraud in the inducement;

(4) The denial (R. 249) by the Circuit Court of petitioners' request (R. 239) for a procedural order requiring a hearing on this and other issues;

(5) The quashing (R. 273) by the Florida Supreme Court of petitioners' appeal (R. 272) arguing the failure to grant a hearing on this and other issues as a denial of due process in violation of the Fourteenth Amendment;

(6) Its denial (R. 278) of petitioners' petition (R. 274) for re-hearing of its order quashing this appeal.

Cases relied upon to support jurisdiction of this question include Postal Telegraph Cable Co. vs. City of Newport, 247 U.S. 464, 38 S. Ct. 566, 62 L. Ed. 1215, and authorities cited in Sylvan Beach, Inc., vs. Koch (8 Cir.) 140 F. 2d 852, 861.

The Second Federal Question

The second constitutional question within the Court's jurisdiction arises from petitioners' claim that the order (R. 273) of the Florida Supreme Court quashing petitioners' appeal (R. 272) from the decree of the

Circuit Court of Dade County denied them the equal protection of the law in that although the laws of Florida provide that appeals in chancery cases are matters of right, petitioners were effectively denied the right of appeal accorded to all other litigants similarly situated by the decision of the Florida Supreme Court quashing its appeal on the day it was docketed and within six days of its filing, without a hearing and without the filing of a brief on behalf of appellant.

Upon the Court's entry of this order, petitioners raised the federal question by petition for re-hearing of the order, urging that the denial of the appeal was a denial of the equal protection of the laws. (R. 274) This petition was denied. (R. 278)

Cases relied upon to support jurisdiction of this question include Rooker vs. Fidelity Trust Co., 263 U.S. 413, 44 S. Ct. 149, 68 L. Ed. 362 and Anderson National Bank v. Luckett, 321 U. S. 233, 64 S. Ct. 599, 88 L. Ed. 692, 151 A.L.R. 824.

The Third Federal Question

The third constitutional question within the Court's jurisdiction stems from petitioners' claim that the decision (R. 202-273) of the Florida Supreme Court granting enforcement against petitioners of an option agreement which the uncontradicted evidence established had been released and cancelled by a valid written instrument, deprived them of their property without substantive due process of law.

Petitioners raised this constitutional question as soon as it appeared by filing a petition for re-hearing of the Florida Supreme Court's decision challenging it on the ground that it violated the due process clause of the Fourteenth Amendment. (R. 206) This petition was denied. (R. 222) They renewed the question by a subsequent appeal (R. 272) to the Florida Supreme Court from the Circuit Court's final decree pursuant to the

Supreme Court's mandate, which appeal was quashed (R. 273), and by petition (R. 274) for re-hearing upon said quashing order, which was denied. (R. 278)

Cases relied upon to support jurisdiction of this question include Brinkerhoff-Faris Trust Co. v. Hill, 281 U. S. 673-677, 678; Great Northern R. Co. v. Sunburst Oil Co., 287 U. S. 358, 366-7; Ohio ex rel. Bryant v. Akron Park District.

The above proceedings did not result in a final decree as regards the filing of a petition for certiorari in this Court until the entry of the order of the Supreme Court of Florida denying petitioners' petition for rehearing upon the order of the Court denying their third petition for certiorari, which occurred on January 21, 1952.

QUESTIONS PRESENTED

The questions here presented are stated as follows:

Question I:

In dealing with basic common law principles, of universal recognition, were the courts of Florida at liberty to arbitrarily and capriciously apply against petitioners rules, not applicable to others, so as to take away petitioners personal and property rights?

Question II:

Where a plaintiff in a State Court suit seeks specific performance of an alleged option for the purchase of corporate stock, ignoring the fact that he has discharged the optionors by executing to them a valid formal release, and the optionors plead and establish the release as a valid contract, and plaintiff appeals from the decree dismissing his complaint, may the appellate court also entirely ignore and disregard the release, and arbitrarily direct that the option be enforced, thereby depriving the optionors of their personal and property

rights without substantive due process of law, contrary to the Fourteenth Amendment?

Question III-A:

Where an appellate court, in arbitrarily reversing the correct decree of a lower court, discloses that it has capriciously elected to ignore and to disregard undisputed facts that lie at the very heart of the controversy and are controlling as to the rights of the litigants, and afterward arbitrarily denies the wronged parties access to remedies provided by statute and by court rules, and which are accorded to others similarly situated, for the correction of the errors committed, to the end that a clear miscarriage of justice results from such discrimination, can it be said that procedural due process has been afforded?

Question III-B

Ancillary to the foregoing is the question of due process presented by the action of the State Court in making its judgment conclusive on the absent parties. Could both the Circuit Court and the Florida Supreme Court deny them the right to be heard?

Question IV:

Can it be said that petitioners are not entitled to protection under the Fourteenth Amendment because, the taking from petitioners by judicial decree of the negotiable securities, of enormous value, of which petitioners had possession and under which they held "rights", was not "state action" within the meaning of the due process and equal protection clauses?

Question V:

Does the record of this cause contain a basis for the correct assertion that the third party owners of the negotiable securities, who have been deprived of their property without due process, alone can complain?

Question VI:

Can it be held that the Supreme Court of Florida has accorded petitioners procedural due process and equal protection of laws when it abandoned the rules by which it has always been governed, and for this case, made and applied new contrary rules, not applicable to others?

Question VII:

Were the threats of jail commitment, to accomplish the delivery of securities owned by third persons, and the final adjudication of contempt against petitioners invasions of the personal rights guaranteed to them by the Fourteenth Amendment?

Although these questions presently concern, directly, only a relatively small group of individuals, all persons who may claim rights of life, liberty, property and contract, under the Federal Constitution, are indirectly but vitally concerned, for if the highest court of a state may usurp power and proceed in this case to work an unconstitutional deprivation of property and denial of due process, then other courts in other cases may with impunity do likewise, and constitutional guaranties will by erosion be destroyed. The present case is one of large importance and of great significance.

In addition, important questions will be presented as to the ownership of and title to the 400,000 odd shares of Maule Industries, Inc., stock, representing control of the corporation. The stock brokers now having the stock may market it throughout the country to small investors, and such purchasers may have titles so questionable in character as to involve inhabitants of states from Maine to California in litigation. Unsettled questions of law exist as to the extent to which the stock certificates are negotiable instruments, under such circumstances as exist here.

But whether one or many are affected, the Constitutional Guaranty of Due Process of Law was intended to protect the individual—the smallest unit of society —as such, against arbitrary exercise of Governmental Power, and was and is intended to secure to all Equal Protection of the Law.

REASONS FOR GRANTING THE WRIT

Petitioners strongly urge that this is an appropriate and important case for this Court to consider for the following reasons:

1. This Court is the sole tribunal empowered to safeguard the constitutional rights of individuals from the actions of state courts and to require of such courts a due regard for the orderly processes of justice guaranteed by the Constitution of the United States. It should take jurisdiction of this case to restore rights of petitioners and of other individuals not before the Court which have been trampled by a peremptory and arbitrary abuse of judicial prerogatives by the courts of Florida in this case.

2. The decisions of the Supreme Court of Florida denied petitioners procedural due process in depriving them throughout the case of a factual hearing on two important and legally unchallenged defenses urged by them, that of fraud in the inducement of the contract sued upon, and that of lack of equity power to grant specific performance where the parties contract with knowledge that the seller does not possess or control the property agreed to be sold.

3. The decisions of the Supreme Court of Florida deprived petitioners and the persons not parties to the action whose 295,043 shares of Maule Industries stock petitioners were compelled to deliver and transfer, of liberty and property, respectively, without due process of law, in refusing petitioners a hearing on the issue of whether petitioners owned or had authority to transfer said stock.

4. The decisions of the Supreme Court of Florida, in compelling petitioners to deliver and transfer stock owned by persons not parties to the action, without requiring that such persons be made parties to the action, deprived said owners of their property without due process of law, displaying utter disregard for the rights of such persons.

5. The decision of the Supreme Court of Florida deprived petitioners of their liberty without due process of law in upholding the action of the Dade County Circuit Court in compelling petitioners under threat of imprisonment for contempt to deliver and transfer stocks entrusted to them by friends and business associates which their uncontradicted allegations showed they neither owned nor had authority to transfer. This decision compelled petitioners as the price of their liberty either to commit a wrongful act or to require of these friends the surrender of property rights.

6. The decision of the Supreme Court of Florida quashing petitioners' appeal without hearing or briefs in circumstances in which the right of appeal is granted to all other litigants by statute and by court rule in Florida denied to them the equal protection of the laws.

7. In their conduct of this case, the courts of Florida have, through honest error or arbitrary high-handedness, so impeded and restricted petitioners in their presentation of their defenses, as effectively to deny them the hearing to which they are entitled, thereby depriving them of their rights without benefit of the procedures comprising the due processes of the law.

8. The decisions of the Supreme Court of Florida deprived petitioners of property without substantive due process in authorizing the Circuit Court of Dade County to require of petitioners the specific performance of a stock option agreement which the uncontradicted evidence established had been released and cancelled by

a written instrument, no ground whatever for disregarding the release appearing in the record.

9. The decisions of the Supreme Court of Florida deprived petitioners of property without substantive due process in authorizing the Circuit Court of Dade County to require of petitioners the specific performance of either of two agreements at the option of respondents although only one of the two agreements could legally be in effect, since they were mutually exclusive and inconsistent and one was the successor of the other.

10. While errors of contract and property law do not ordinarily present a question reviewable by this Court, the persistent error of the Florida Supreme Court in ignoring an undisputed and unchallenged release and enforcing a cancelled contract represents such a flagrant departure from recognized legal principles as to constitute not mere error of law but utter disregard of clear substantive legal rights, resulting in a deprivation of property without the substance of due process.

11. The injuries to individual rights inflicted in this case commend themselves to the attention of this Court.

12. Of at least equal importance, this case affords excellent occasion for this Court to remind the state courts that even though the rights involved may be those of contract or property, flagrant departures from recognized legal principles or established procedures may result in a denial of due process, which this Court will correct.

I

The question as to substantive due process is, accordingly, presented by reason of facts which may be summed up in this way. The negotiations of Mr. Streit, respondent, with petitioners had resulted in a crudely prepared and incomplete letter-option agreement of February 8, 1950, with respect to the sale of "approxi-

mately 440,000" shares of the stock of the company at a stated price, of which stock petitioners were known by said respondent to own but 136,399 shares. It was contemplated both by petitioners and respondent that the remaining shares, and a portion of the first mortgage bonds constituting the outstanding bond issue, would be acquired by petitioners if respondent elected to take under the option. The option agreement was of questionable validity, however, because of false representations made by respondent in connection with its procurement. The validity of the option agreement was in dispute on the night of March 9, 1950, and the expiration date of the option was March 10, 1950. Accordingly, on the night preceding the expiration date, the February 8, 1950, letter-agreement was rescinded and rendered of no effect whatever, by mutual agreement.

A formal common law release wherein J. Bradley Streit was releasor, and C. B. King, John H. Gerken and M. F. Pafford, petitioners, were releasees, was prepared, executed and delivered, in consideration of the return by the releasees to the releasor of the sum of $10,000, that being the amount that had been paid by Mr. Streit for the option on February 8, 1950. The release was unconditional and absolute, by its terms. The terms and conditions of the release were not subject to being varied by parol testimony, and no attempt was made to vary the release in that manner.

Mr. Streit was, and is, a stock broker of many years experience and he was in no way overreached or coerced in the matter. He did not attack the release on the grounds of fraud, or otherwise, but in his bill of complaint for specific performance, as filed in the Circuit Court of Dade County, he ignored the release entirely, making no reference to it, and did not disclose the fact that the consideration paid by him for the initial option had been returned in toto, by mutual agreement, and accepted by him. In the litigation which followed, the Circuit Court of Dade County determined, as it was obliged to do, that the release was a valid and binding contract,

for which petitioners had paid value; that it could not be ignored, without doing violence to the due process and equal protection clauses of the Fourteenth Amendment of the Federal Constitution; and that as the second option agreement between petitioners, as optionors, and Streit and Wallace as optionees, respecting 300,000 shares of the stock of Maule Industries, was not sufficiently complete to be enforceable, respondents had no cause of action or grounds for equitable relief.

Nevertheless, the Supreme Court of Florida, on appeal by Streit and Wallace, saw fit to disregard the findings of the Circuit Judge, and also elected to completely disregard and ignore the release and the extinguishment of the first letter-option. The opinion of the Supreme Court of Florida, handed down on August 24, 1951, wherein the Supreme Court of Florida undertook to justify its ruling in reversing the Circuit Judge, demonstrates the fact that the release instrument, and the consideration therefor, and the validity thereof was willfully, arbitrarily, capriciously, and without regard for undisputed facts, and without regard for the issues presented and tried in the court below, disregarded in such manner as to deprive petitioners of personal rights and large and substantial property rights.

A question here presented is, accordingly, as to whether the Supreme Court of Florida, in its decision of August 24, 1951, accorded the petitioners, C. B. King, J. H. Gerken and M. F. Pafford, substantive due process of law, and equal protection, or whether, on the other hand, these petitioners were thereby denied and deprived of such due process and equal protection, in violation of the Fourteenth Amendment of the Constitution of the United States.

II

The principal question as to the want of procedural due process in this case arises from the refusal of the Supreme Court of Florida to hear petitioners in their

statutory appeal from the final decree against them, entered in the Circuit Court of Dade County, on November 15, 1951. However, other questions as to procedural due process are presented and an outline of the proceedings in which these questions arose appears to be necessary.

It has been mentioned that the letter-option of February 8, 1950, related to "approximately 440,000" shares of the stock of the company, and to first mortgage bonds thereof, only a fractional part of which were owned by petitioners, as optionors. The proposed sale was, accordingly, a "short sale". It has also been mentioned that respondent, J. Bradley Streit, was fully aware of the nature of the transaction and of the last-stated fact. He was at the time, and presently is, doing business as "J. Bradley Streit, Member Toronto Stock Exchange, Room 803—66 King Street West, Toronto 1, Ontario, Canada". Certainly he was not a novice as to securities purchase and sales transactions, and his failure to allege in his bill of complaint for the specific performance of the so-called option agreements that Messrs. King, Gerken and Pafford were the owners of the "approximately 400,000 shares" of the stock, and of the bonds, or had represented themselves to be such owners, is consistent with the fact that he was fully informed in that behalf. His failure to set forth in his bill of complaint the fact that the February 8, 1950, contemplated option has been formally released, rescinded, and annulled, with a return to him of the $10,000 paid as consideration, is also significant.

In any event, the bill of complaint for specific performance was fatally defective for several reasons, one of the reasons being that it contained no allegation of ownership of the securities by the purported sellers, and as a matter of elementary law, a bill for specific performance will not lie with respect to a "short sale." Accordingly, petitioners, as defendants, moved to dismiss the bill. They also moved for a summary judgment under an existing and applicable rule of procedure, in

effect, at the time. The motion for summary judgment was supported by an affidavit detailing, to some extent, the ultimate facts of the transaction, and although no counter-affidavit was interposed, and although the motion for summary judgment was submitted to the Circuit Judge as uncontradicted, factually, both of the motions were denied.

Petitioners thereupon applied to the Supreme Court of Florida for review by certiorari. The matter came on for hearing before the Supreme Court of Florida on January 8, 1951, and was handled as a "motion calendar" matter. Twenty-two other "motion calendar" hearings were scheduled for the same day, and on the same day the petition for certiorari was denied. The Supreme Court of Florida simply declined to take jurisdiction, at that time, and while its action in that behalf, standing alone, would not amount to a denial of procedural due process, this represents one step in the proceedings and is illustrative of the various attempts which the petitioners have made, unsuccessfully, to be heard.

After petitioners had filed their answer to the bill for specific performance, the case came on for hearing before the Circuit Judge, in Dade County. At that time, the record disclosed the absolute and unconditional formal release of the so-called first option agreement by the optionee, J. Bradley Streit; it disclosed that the agreement had been rescinded by mutual consent and that the $10,000 which Mr. Streit had paid as a consideration for the option had been returned to and received by him. The record also disclosed that the second option letter, dated March 9, 1950, wherein petitioners were optionors and Messrs. Streit and Wallace, respondents, were optionees, had become ineffective by reason of the fact that the parties could not agree upon the voting control of the 300,000 shares of stock referred to therein, so as to complete a voting trust agreement, as required by the option letter. The Circuit Judge thereupon stated that it appeared quite clear to him that the optionees were

without a specifically enforceable agreement. He announced that he would, nevertheless, be obliged to take some testimony, and so proceeded.

In entering a final decree in favor of petitioners, and dismissing the bill for specific performances, the Circuit Judge missed the point entirely as to one of the defenses which petitioners had interposed. He purported to understand that the defense based upon a procurement of the February 8, 1950, option letter through false representations was an attempt to vary, by parol, the terms of a written agreement. That, of course, was in no sense the defense sought to b interposed. However, as the bill of complaint was dismissed out of court at the cost of Streit and Wallace, the plaintiffs therein, the error committed by the Circuit Judge with respect to the last mentioned defense was harmless to petitioners, then, and of no consequences. Petitioners had no occasion to complain of the error at that time, and neither did they have occasion then to complain, further, of the errors committed at earlier stages, with respect to the motions above discussed. The fact that the court undertook to try an issue not presented did not, at that time, amount to a want of procedural due process, as to petitioners, because petitioners had not been harmed thereby. The error was, at that stage of the proceedings, purely technical. Accordingly, they had no occasion to file, and were not required to file, as cross appeal or cross assignments of error. They could not anticipate that the Supreme Court of Florida would, on the appeal of Streit and Wallace deny them all semblance of substantive due process.

When on August 24, 1951, the Supreme Court of Florida handed down its unprecedented and unexpected decision, ignoring the unimpeached rescission and release of the February 8, 1950, option agreement, and purporting to dispose of the litigation upon issues not presented, insisted upon or tried, then petitioners, by way of a petition for rehearing, filed in the Supreme

Court of Florida, undertook to obtain relief, and to be heard as to the substantive due process question. Manifestly, they could not at that time file a cross appeal or cross assignments of error, but their petition for rehearing pointed out the substantive due process denial, (but not the procedural due process denial) here complained of. Notwithstanding this, the Florida Supreme Court denied the petition for rehearing, and having denied that petition, it cannot now be logically asserted that petitioners were in fact then heard with respect thereto.

After the mandate of the Supreme Court of Florida on the first appeal came down and was lodged in the Circuit Court of Dade County, petitioners then filed in the Circuit Court a petition for a procedural order. In that petition, they sought again an opportunity to raise the question as to ownership of the securities, the "short sale" question, and the other matters as to which they had not been heard. The Circuit Court refused to entertain their petition and proceeded to enter an order denying it. At the same time, the Circuit Judge summarily entered a final decree in favor of J. Bradley Streit, for specific performance, unconditionally requiring that King, Gerken and Pafford, as defendants, should produce to the court at 12 o'clock noon on November 29, 1951, 440,000 shares, (not "approximately 440,000 shares" as called for by the letter-agreement), of the stock of Maule Industries, Inc., and the first mortgage bonds. The Circuit Judge declined to hear Petitioners as to the ownership of the said securities, and so prepared the final decree as to put petitioners in contempt of court, in event of non-compliance, under Florida Equity Rule Number 67, the said rule also being Section 63.37 of the Florida Statute, providing:

> ". . . If the decree be for performance of any specific act, as, for example, for the execution of a conveyance of land or the delivering up of deeds or other documents, the decree shall, in all cases, prescribe the time within which the act shall be done,

of which the defendant shall be bound, without further service, to take notice; and upon affidavit of the plaintiff, filed in the clerk's office, that the same has not been complied with within the prescribed time, the clerk shall issue a writ of attachment against the delinquent party, from which, if attached thereon, he shall not be discharged, unless upon a full compliance with the decree and in payment of all costs . . ."

At no time prior to the entry of the final decree of November 15, 1951, had there been entered in the case any appealable order or decree against petitioners. They had, as has been stated, sought in accordance with Florida practice, a review of earlier orders upon a petition for certiorari, but their petition had been denied. They were entitled to appeal from the adverse final decree, as a matter of right, under the provisions of Section 59.01 (4) of the Florida Statute, as amended by Florida Session Laws of 1945, Chapter 22854, Section 1. They had had no reason to appeal from the first final decree, dismissing the bill of complaint of Streit and Wallace, as heretofore pointed out, and, further, under the Florida Practice, Rule 11 (c) of the Florida Supreme Court rule, applicable to the stated situation, it is provided:

"(c) CROSS ASSIGNMENTS OF ERROR BY APPELLEE. The appellee may include cross assignments of error with his directions, but the failure of an appellee to file cross assignments of error shall in no event be construed so as to prevent him from thereafter appealing from an adverse ruling."

From the adverse final decree of November 15, 1951, (R. 252) petitioners on November 21, 1951, filed their first and only appeal to the Supreme Court of Florida (R. 253). They assigned errors (R. 254) committed by the Circuit Judge, in Dade County, as follows:

"1. The Circuit Court erred in denying the defendants' Petition for Procedural Order, as filed

herein on the 9th day of November, 1951, with respect to each separate paragraph and each prayer thereof, and in entering order on the 15th day of November, 1951, denying said Petition.

2. The Circuit Court erred in entering final decree herein on the 15th day of November, 1951, said decree being of record in Chancery Order Book 1010, at page 199.

3. The Circuit Court erred in decreeing that the plaintiffs had a right to elect to accept the so-called first option and to proceed to enforce the same; and, thereupon, to order and decree that the defendants, as alleged optionors, should tender unto the optionees, plaintiffs, the certificates of stock and bonds, described, for election by optionees as to acceptance.

4. The Circuit Court erred in decreeing that plaintiffs, as optionees, should be relieved of making a tender to defendants, as optionors, of the purchase price, as a condition precedent to delivery of the securities.

5. The Circuit Court erred in departing from the Pre-Trial Order of March 5, 1951, and erred as to the issues presented for adjudication, said errors having been harmless errors at all times prior to the reversal of the first final decree by the Supreme Court of Florida, but which errors in view of such reversal, are of controlling importance, involving matters as to which these defendants have not been heard factually.

6. The Circuit Court erred in entering its opinion-order of April 2, 1951, in considering and passing upon questions not involved, and as to which defendants have not been heard; in setting forth therein obiter dicta, and in later construing such obiter dicta as conclusive and as binding upon these defendants, after reversal on appeal of a decree favorable to the defendants. In this behalf, defendants have been denied a hearing, and have been

deprived of due process of law in violation of the Fourteenth Amendment of the Constitution of the United States, and in violation of the Constitution and Laws of the State of Florida, procedurally.

7. In denying the defendants' Petition for a Procedural Order herein, as filed on November 9, 1951, the Circuit Court departed from the mandate, judgment and opinion of the Supreme Court of Florida, previously issued, and so construed said mandate, judgment and opinion as to render the same violative of the Fourteenth Amendment of the Constitution of the United States of America and so as to deprive the defendants, appellees herein, of due process of law, for that the said Circuit Court did, then and there, and by entry of final decree herein in favor of the plaintiffs, deprive the defendants of valid and subsisting contract rights, and did thereby deprive the defendants of contract rights owned and held by them under a common law release, for which they had paid a consideration of Ten Thousand Dollars $10,000.00); the said release being undisputed and unimpeached, in the record.

8. The Courts of the State of Florida have, herein, deprived the defendants of due process of law and equal protection of law, to which they are entitled under the Constitution of the United States of America, by ordering, through mandate and decree, that these defendants shall submit to a contract not made by them, thereby imposing upon the defendants penalties and depriving defendants of other substantive rights.

9. The final decree entered herein, purporting to authorize the plaintiffs to proceed under the so-called option of February 8, 1950, is violative of the due process clause of the Constitution of the United States and is violative of the Constitution and Laws of the State of Florida, in that the Court has therein undertaken to determine, in advance, that if the plaintiffs as optionees fail to consummate the purchase of the stock and bonds involved, the

defendants will be entitled to the sum, only, of Ten Thousand Dollars ($10,000.00) as liquidated damages, to be represented by a judgment or decree to be hereafter entered against non-residents of the State of Florida, defendants not having in their possession the said Ten Thousand Dollars ($10,000.00) and not having access thereto.

10. The Circuit Court erred as to its disregard of the concluding paragraph of the opinion of the Supreme Court of Florida, to-wit, the part thereof reading as follows:

> "If on the other hand, appellees persist in refusing to cooperate in setting up the voting trust they can claim no benefit from it and appellants may at their option proceed to enforce the second contract without the voting trust."

By their sworn Petition for Procedural Order, filed herein on the 9th day of November, 1951, the said appellees, as defendants, offered to negotiate in good faith and to cooperate in setting up a voting trust, pursuant to the Supreme Court opinion and mandate, but their offer in that behalf was erroneously denied, to the prejudice of the defendants who were thereby deprived of a substantial contract right, and property right, in violation of the Due Process and Equal Protection of [illegible] clauses of the Constitution of the United States, and in violation of the Constitution and Laws of the State of Florida."

That appeal, filed in the Circuit Court of Dade County, Florida, on November 21, 1951, was presented under transcript of the record of the proceedings which was filed in the Supreme Court of Florida, at Tallahassee, on November 27, 1951 (R. 273). On that date, C. B. King, John H. Gerken and M. F. Pafford, as appellants, made application to the Supreme Court of Florida for a supersedeas, but their motion was denied, and the appeal was summarily dismissed, without hearing;

without a statement of the questions presented and points relied on by appellant; and without a brief on behalf of appellant having been filed.

The Supreme Court of Florida, on November 27, 1951, (R. 273) entered an order on that appeal, in words and figures as follows:

> "Upon consideration of the motion of counsel for appellees to dismiss the appeal in this cause or affirm the decree of the court below and the motion of counsel for appellants for an order of supersedeas, it is ordered that supersedeas be and the same is hereby denied; it is further ordered that the appeal which was entered in this cause in the Circuit Court of Dade County in Chancery (No. 133703) on November 21st, 1951, be and the same is hereby quashed; Section 59.33 Florida Statutes 1951 as the questions raised in said appeal were decided in the former appeal of this cause."

Thereby petitioners, as appellants, were denied a hearing, and were denied due process of law, and were denied equal protection of law, in violation of the Fourteenth Amendment of the Federal Constitution. They had not been given even a colorable hearing as to the questions they sought to raise and to present under their ten assignments of error, above referred to. At no earlier time had petitioners assigned, nor had they been able to assign, the errors referred to, and at no time had they obtained a hearing thereon. They had attempted to obtain a hearing as to a question to substantive due process and as to the denial of substantive due process under the decision and opinion of the Florida Supreme Court as entered on August 24, 1951. Their attempt to be heard, in that regard, was by way of a petition for rehearing, but they were in fact not heard in that respect for the reason that their petition was denied, as the record affirmatively discloses.

Having failed in their effort to supercede the adverse final decree of November 15, 1951, petitioners

were confronted with threats of commitment to jail for contempt of court if they failed to produce the 440,000 shares of stock, and the unregistered first mortgage bonds, at 12 o'clock noon on November 29, 1951, under the provisions of Florida Equity Rule No. 67 and Section 63.37 of the Florida Statute, above quoted. They had previously tried, in good faith, to make a showing that they did not own, and had not owned, more than 136,399 shares of the stock, but the court had refused to hear them in that respect (R. 244). Accordingly, at the time appointed they did all that they could do to avoid the ignominy and disgrace of jail commitment, as for contempt, by bringing in and tendering into the registry of the court the 136,399 shares of stock which they owned, and also additional stock certificates, in their possession, belonging to others, aggregating 431,-442 shares. They were unable to assemble, for any purpose, the 440,000 shares required. Nevertheless, they tendered the said stock certificates into the registry of the court, with a full statement into the record as to the ownership thereof. At the same time, they produced and tendered into the registry of the court, under the same conditions and with the same statements as to ownership, five per cent first mortgage bonds of Maule Industries, Inc., (unregistered), owned and held as follows:

Kathryn C. Maule	$156,400
Kathryn M. King	204,400
C. B. King	23,000
Eleanor Gerken	164,400
John Gerken	29,000
M. F. Pafford	15,400
Total	$592,600

The Circuit Court ordered (R. 299-303) that the stocks and bonds, including those owned by the numerous third parties heretofore mentioned, be delivered to the First National Bank of Miami, on behalf of J. Bradley Streit. They were so delivered under pain of com-

mitment for contempt of court. The surrender of these securities was, however, accompanied by a statement of counsel (R. 296) on behalf of petitioners, made into the record as follows:

> "The production by the defendants of the stock certificates aforesaid, and the first mortgage bonds, and the delivery to the said trust office for safe keeping, is deemed by the parties, or their counsel, a measure of safety and expediency, and is not to be construed as a voluntary act on the part of the defendants, the defendants having as aforesaid, produced the securities and having offered to tender the same into the registry of the court. In so proceeding the defendants are not waiving any of their rights or waiving any of the assertions or declarations contained in the affidavit which was submitted earlier today to Hon. Vincent C. Giblin, Judge, the affidavit having been submitted at the time of the production by the defendants of the securities to the Circuit Court. These defendants have not tendered and do not tender the said securities to the plaintiff, J. Bradley Streit."

The affidavit referred to above made by Messrs. King, Gerken and Pafford (R. 298), had, as indicated, been spread upon the record of the proceedings. It had appropriately been made a part of the act of petitioners in producing the securities, under the Court's mandate, and surrendering them unto the custody of the Court.

The receipt issued for the securities was not to Messrs. King, Gerken and Pafford, but to the Court. It is (R. 297) as follows:

RECEIPT

"$591,600. MAULE INDUSTRIES, INC., (A FLORIDA CORPORATION) FIRST MORTGAGE BOND 5%, DUE 5-1-57, 1-1-52 & SCA, #1/138, 174/313, 384/613, 677, 809/857,

920/943, 955/958, 985, 996/998 - $1,000. EACH, #999/1010, #1015/1018 - $100. EACH, BEARER FORM.

431,442 SHS, MAULE INDUSTRIES, INC., (A FLORIDA CORPORATION) COMMON, $1. PAR, CTF. #375 - 2,000 SHS, N/O MARION F. PAFFORD, ENDORSED M. F. PAFFORD; #7895/7897, #7268, - 5,000 SHS EACH, #2999 - 3,600 SHS, #2947 - 3,450 SHS, #2946 - 10,000 SHS, #2776/77 - 500 SHS. EACH, #1455 - 4,000 SHS, #1444 - 4,500 SHS, #1385 - 3,901 SHS, #738 - 1,010 SHS, #32 - 623 SHS, N/O M. F. PAFFORD, ENDORSED M. F. PAFFORD: #6433 - 11,500 SHS, N/O MRS. HELEN K. TELLEKAMP - NOT ENDORSED; #1220, #1761/62 - 5,000 SHS EACH, #5726 - 37,781 SHS, N/O JOHN H. GERKEN, JR. - SAME ENDORSEMENT; #419 - 9,153 SHS, N/O C. B. KING - ENDORSED; #378 - 2,000 SHS, #1449 - 5,000 SHS, #1121 - 8,381 SHS, #1421/22 - 10,000 SHS. EACH, N/O CHARLES B. KING - ENDORSED; #40 - 13,859 SHS, N/O ELEANOR GERKEN #16 - 103,436 SHS, N/O ELEANOR GERKEN - BOTH ENDORSED; #422 - 9,859 SHS, #1053 - 38,436 SHS, N/O KATHRYN M. KING - ENDORSED; #417, #420 - 2,000 SHS. EACH, #667 - 7,500 SHS, N/O CHARLES B. KING, JR., ENDORSED; #13 - 79,372 SHS, #34 - 12,081 SHS, N/O KATHRYN C. MAULE, ENDORSED.

Received from the Circuit Court of Dade County, Florida the above described stock certificates and bonds in behalf of J. Bradley Streit this 29th day of November, 1951.

Loftin Anderson Scott McCarthy and
Preston, Daniel P S. Paul,
Attorneys for J. Bradley Streit"

Although the final decree unconditionally commanded petitioners to tender 440,000 shares of the stock, and the bonds, to J. Bradley Streit, that was not done. At no time did petitioners tender the securities to Streit. Petitioners delivered the securities to the Court, under duress and under protest, and with a full statement as to the ownership of the stock and bonds, as a basis for further proceedings according to law. It was at all times made clear that petitioners could not lawfully, and would not, accept the funds representing the purchase price.

It was at all times during the proceedings made clear that petitioners were being deprived of the property of others; that they were surrendering the stocks and bonds to the Court, and not to respondents; and that they were being compelled to make such delivery, under a very present threat of commitment to jail, otherwise.

Thereafter, by petition for certiorari duly filed in the Supreme Court of Florida (R. 281), petitioners sought to have reviewed and vacated, in accordance with Florida Law, the order of the Circuit Judge under which the stocks and bonds aforesaid were directed to be delivered by the Clerk of the Circuit Court to J. Bradley Streit. The Florida Supreme Court, however, summarily denied the petition for certiorari (R. 307), and declined to hear petitioners in that behalf. The court's ruling aforesaid, as well as the ruling of the Judge of the Circuit Court of Dade County, complained of, denied petitioners due process of law and deprived them of property rights without due process of law, and without equal protection of law, in violation of the constitutional guaranties.

J. Bradley Streit, having obtained possession of the securities, or having nominal possession thereof, by reason of the fact that the funds purported to represent the purchase price (now held by the Circuit Judge) had

been produced to the First National Bank of Miami, Florida, through McDonald & Company, of Cleveland, Ohio, investment brokers, then petitioned (R. 314) the Circuit Judge to commit petitioners to jail for contempt of court for failure on the part of petitioners to transfer the 431,442 shares of stock to J. Bradley Streit, or in his name, on the books of Maule Industries, Inc. Petitioners had not been ordered to effect such transfer, but nevertheless the Circuit Court Judge entered an order (R. 311) holding the petitioners in contempt and directing that they purge themselves by causing the transfer to be effected within a period of two hours. Petitioners then lodged in the Supreme Court of Florida their third petition for a writ of certiorari (R. 309), for the purpose of obtaining a review and vacation of the contempt order last mentioned, on the ground that the said order amounted to an arbitrary abuse of power and was in violation of the due process clause of the Fourteenth Amendment of the Federal Constitution. Their third petition was also summarily denied (R. 328).

Therefore, it is the duty of the United States Supreme Court to review and correct the miscarriage of justice, and denial of fundamental rights, so perpetrated. This Court will, of course, review a state court decision in order to determine whether the basis of fact upon which the state court rested its decision denying asserted Federal rights has any support in the record.

I

Question: In dealing with basic common law principles, of universal recognition, were the courts of Florida at liberty to arbitrarily and capriciously apply against petitioners rules, not applicable to others, so as to take away petitioners personal and property rights?

Discussion: We find, at the very core of this case, the common law release executed by J. Bradley Streit to petitioners on March 9, 1950, discharging the so-called

first option. It may, therefore, be appropriate, as a preliminary part of the discussion that will follow, to briefly consider the law of releases as it relates to questions here presented.

It has been noted that the Florida Supreme Court in the present case ignored the release, but it is hardly to be supposed that such action is a matter of public policy in Florida or consonant with the usages, customs and practices usually obtaining in that jurisdiction. On the contrary, the Florida Supreme Court has in prior cases firmly upheld the effectiveness of releases as is shown by McComb v. Hygeia Coca-Cola Bottling Works, 137 Fla. 260, 188 So. 219, 222, thus:

> "The plaintiff is shown to have received the sum of One Hundred and Sixty Dollars as the 'sole consideration' for the execution and delivery to the defendant of a discharge and full satisfaction of all claims for damages from certain injuries. If the plaintiff is allowed to show on the trial of the cause other considerations flowing from the alleged injury, then the rule against varying the terms of a written instrument will be violated. We have considered the cases cited by counsel for plaintiff in error: Mallard v. Ewing, 121 Fla. 654, 164 So. 674; Henderson v. Kendrick, 82 Fla. 110, 89 So. 635; Bond v. Hewitt, 111 Fla. 180, 149 So. 606; Reed v. Kansas Postal Tele. & Cable Co., 125 Kan. 603, 264 P. 1065, 57 A.L.R. 275, and annotations pages 279 to 284.
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> "It was held that a party cannot, either in law or equity, contradict or vary terms of his unwritten unambiguous contract by showing that while he signed the same, there was an agreement resting in parol that he was not bound by the terms thereof. Such pleas present no defense and were held bad on demurrer. See Holly Hill Grove & Fruit Co. v. Wicker, 101 Fla. 181, 133 So. 622; Stonebraker v. Reliance Life Ins. Co., 123 Fla. 244, 166 So. 583;

Milton v. Burton, 79 Fla. 266, 84 So. 147; Georgia Home Ins. Co. v. Hoskins, 71 Fla. 282, 71 So. 295; Bryan v. St. Andrews Bay Com. Hotel Corp., 99 Fla. 132, 126 So. 142; Bacon v. Green, 36 Fla. 325, 18 So. 870; Robinson & Co. v. Hyer Bros., 35 Fla. 544, 17 So. 745; Jenkins v. Lykes, 19 Fla. 148, 45 Am. Rep. 19; Spann v. Blatzell, 1 Fla. 301, 46 Am. Dec. 346."

A release differs from a receipt in that a release extinguishes a pre-existing right, while a receipt is mere evidence of a fact. A litigant may contradict a receipt but not a release. Adams vs. Camden Safe Deposit & Trust Co., 13 N. J. Misc. 48, 188 Atl. 913, 914:

"The general rule is that oral evidence cannot be introduced to vary the terms of a written instrument. This is especially true of a release.

"Wigmore on Evidence, vol. 5, p. 311, § 2432, 'Receipts and Releases,' says: 'A receipt—i.e. a written acknowledgement, handed by one party to the other, of the manual custody of money or other personalty—will in general fall without the line of the rule; i.e. it is not intended to be an exclusive memorial, and the facts may be shown irrespective of the terms of the receipt * * * But where the writing is itself the very act, as where it grants a discharge or release of a claim, or embodies a new obligation, it obviously falls within the rule, and its terms cannot be overthrown.' * * *

"Wigmore again says, vol. 5, p. 312, Cowen, J., in McCrea v. Purmort, 16 Wend. (N.Y.) 460, 473, 30 Am. Dec. 103: 'A release cannot be contradicted or explained by parol, because it extinguishes a preexisting right. The payment of the money discharges or extinguishes the debt; a receipt for the payment does not extinguish the debt; it is only evidence that it has been paid. Not so of a written release; it is not only evidence of the extinguishment; but it is the extinguishment itself.' "

The law of releases in Florida is in accord with the general law on the subject. A release is a contract and unless it is shown to be invalid, it may not be disregarded. Roper vs. Florida Public Utilities Co., 131 Fla. 709, 179 So. 904.

One who has a contractual right or claim against another, or a right or claim to compensation or restitution by reason of another's breach or alleged breach of his contractual duty, has the power to discharge the right, claim and cause of action, and the other's duty, by the execution and delivery of a release. Cairo, T. & S. R. Co. vs. U. S., 267 U. S. 350, 45 S. Ct. 247, 69 L. Ed. 651. Restatement of Contracts, Sec. 402(1).

We are not greatly concerned here with the so-called second option agreement as to 300,000 shares of Maule Industries stock and none of the bonds, and as to which Streit and Wallace jointly, were the optionees. That agreement was, and purported to be, only a part of new negotiations between the parties, Wallace being a new party. The Circuit Judge found and held (R. 198) that as the parties failed to reach an agreement as to the voting trust, it could not be enforced. Afterward, it was wholly abandoned, and so presents no special problem here. But the Circuit Judge's statement as to Florida law applicable to it was correct.

It was held in Carr vs. Duval, 39 U.S. 77, 14 Peters 77, 10 L. Ed. 361, that if it is doubtful whether an agreement has been concluded, or is a mere negotiation, chancery will not decree a specific performance, and this rule was adopted as the law of Florida in the early case of Etheredge v. Barkley, 25 Fla. 818, 6 So. 861, 862, where it was said:

> "And now, can it be that this agreement was binding upon the defendant? Can it be that he is liable upon the same, and the other parties to the agreement are not bound by it, or only bound by it

when they think it is to their interest to be so bound? This is not the law. To make such agreements binding upon one party, it must be binding upon all, and if a party bound violates the agreement it releases the other party. No agreement can bind one party and not the other. In such a case, there is that lack of mutuality or reciprocity which is required to make such agreement binding on any party. Story, supra, and notes thereto; 1 Pars. Cont. 475; Abbott v. Shepard, 48 N.H. 14; Eskridge v. Glover, 26 Amer. Dec. 349, and note thereto; Carr v. Duval, 14 Pet. 77."

The rule of Carr vs. Duval, supra, has since been followed in a long line of cases. It is the established rule in Florida and other jurisdictions.

It was recognized in the time of Chief Justice Marshall, and ever since has been recognized that a court of equity is incapable of affording relief by enforcing specific performance of an agreement not according to its terms. Hunt vs. Rousmanier's Admrs., 21 U.S. 174, 8 Wheat. 174, 5 L. Ed. 589.

We should continue to bear in mind that the only final decree entered below, in respondents' specific performance suit, adverse to petitioners here (the decree of November 15, 1951) was for performance under the rescinded, discharged and released option of February 8, 1950, and not under the agreement of March 9, 1950, the latter having been abandoned on or prior to November 15, 1951, as established by the record.

We refer to Jones vs. Toms, (Fla.), 150 Fla. 873, 9 So. 2d 96.

There, defendant by letter indicated a proposal to sell a 60 per cent interest of corporate stock, and plaintiffs by letter accepted the 60 per cent offer and agreed to pay cash, though defendant did not offer to sell the 60 per cent interest for cash, and due to tax problems it

might have been advantageous to defendant to sell on a term basis rather than for cash, the parties never proceeded beyond the point of negotiation, and there was no written "memorandum" sufficient to comply with the Statute of Frauds. Comp. Gen. Laws 1927, Sec. 5780, now Sec. 725.02, Florida Stats.

The Court said:

"Final judgment holding plaintiffs' declaration insufficient is before us for review on writ of error.

The question is whether certain written memorandum is sufficient to comply with the Statute of Frauds, Comp. Gen. Laws 1927, Sec. 5780, in regard to the sale of corporate stock? The letters are long, much of which is immaterial and would serve no useful purpose to recite here. The parties held a conference and thereafter exchanged several letters. We have examined these letters and have come to the conclusion that they do not evidence the fact that the parties had actually agreed on the sale. The nearest approach that the parties came to a contract was upon the proposal referred to in the defendant's letter of October 8, 1940, wherein he indicated a proposal to sell a 60% interest of the corporate stock.

As we observe from the correspondence as a whole, the parties contemplated this on a time basis. Thereafter discord developed between the parties and the plaintiffs' attorney on October 29, 1940, by letter proposed to accept the offer to sell the 60% interest and in his letter of acceptance proposed to state the terms of payment. The defendant countered that the terms were not satisfactory nor in accordance with the previous conference. Thereupon plaintiff by letter accepted the 60% offer and agreed to pay cash. It did seem that when plaintiff offered to pay cash he had met the requirements of the defendant but we are unable to find where the defendant at any time offered to sell 60% interest for cash, at the same price which he had offered it

on terms. We can well understand that due to tax problems the defendant could afford to sell his property on a term basis for less than for cash. This matter of cash price was for the parties to settle for themselves and it appears to us from a study of the entire record that the negotiation of the parties never proceeded beyond the point of negotiation. That conclusion having been reached it is unnecessary for us to determine whether the writing was sufficiently comprehensive. The law requires that for the memorandum to be sufficient it must satisfactorily show that a contract has actually been made.

The judgment is affirmed."

See also Camichos vs. Diana Stores Corp., 157 Fla. 349, 25 So. 2d 864, and Topper vs. Alcazar Operating Co., 160 Fla. 421, 35 So. 2d 392.

As a matter of rudimentary law, a "memorandum" to be sufficient under the Statute of Frauds must satisfactorily show that a contract has actually been made, and a holding that the statute applies to one individual and not to another in the same situation is not "equal protection".

The rule of the case of Jones vs. Toms, supra, as applied by the Supreme Court of Florida, uniformly both before and after the case at bar, is in accord with the general law, and may we believe be taken as a correct and recognized rule. But however gross the error of the Supreme Court of Florida may have been in failing to apply that rule to our present case, (as initially the trial court properly did), we cannot say that thereby a ground of jurisdiction of this court is made. We can and do say that refusal to do so and the attendant circumstances disclose arbitrary and capricious action on the part of the Florida Supreme Court, as to one phase of the matter, and that if this action is properly correlated with the facts of the case, and viewed in the light of the obstinate and arbitrary manner in which the court per-

sisted in refusing to allow petitioners to be heard, it will become clear that due process and equal protection has been wilfully withheld. It will also be seen that settled principles of law and undisputed facts were after the entry of the first "final" decree, lost in the mazes of procedure and obscured by processes that had become aberrant.

If the Court will refer to the uncontradicted and unchallenged affidavit of petitioners (R. 24), (supporting motion for summary judgment), it will find that the giving by Streit of the unconditional release, discharging the cause of action (first option) under which recovery herein has been allowed, was not denied, and as has been shown, the execution and effectiveness of that release was not subsequently put in issue. If respondents had challenged the release and had put it in issue, and if the issue so joined had come on to be tried, and if Streit and Wallace had given evidence tending to prove that the release did not bear the genuine signature of Streit, as releasor, or that it had been obtained by fraud, it would thereupon have become the duty of the court to adjudge whether the release, so assailed, was invalid. It would have been necessary that the issues stated be determined before any valid judgment upon those issues could be given pursuant to due process of law, the law of the land and the provisions of the Constitution of the United States. But those issues were not raised, the release was ignored, and an adjudication has been attempted upon a basis that is at variance with the undisputed facts contained in the record, and in disregard for the specific findings of the Circuit Judge, the only trier of the facts who has functioned as such herein. Nothing can be clearer from this record than that a question as to the validity of release instrument was not before the Florida Supreme Court, and nothing is clearer than the fact that release was there arbitrarily disregarded.

In Chicago, Burlington & Quincy R. Co. vs. Chi-

cago, 166 U.S. 226, 234, 235, 17 S. Ct. 581, 584, 41 L. Ed. 979, Mr. Justice Harlan, speaking for the Court, said:

> "But a state may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts, and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment."

In Whitney v. California, 274 U.S. 357, 373, 47 S. Ct. 641, 647, 71 L. Ed. 1095, Mr. Justice Brandeis said:

> "Despite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure."

In Cook vs. Cook, 342 U.S. 126, 133, 96 L. Ed. (Adv. Ops) 94, 98, wherein a judgment of the Supreme Court of Vermont was reversed, Mr. Justice Frankfurter, dissenting, said:

> "I am not one of those who thinks that procedure is just folderol or noxious moss. Procedure —the fair, orderly and deliberative method by which claims are to be litigated—goes to the very substance of law."

The substance of the case at bar is that the courts of Florida, by reason of a willful failure to comprehend the matter, or in arbitrary disregard of the undisputed facts, has decreed the specific performance of an option agreement, notwithstanding the complete rescission, discharge, and undisputed formal release thereof. And having accomplished that result, as the record clearly discloses, in violation of due process, has resisted petitioners' remedial efforts with unbelievable obstinacy, allowing folderol and procedural moss to obscure the wrong committed.

Petitioners are definitely conscious of the fact that even an erroneous decision of a state court on matters within its jurisdiction does not ordinarily deprive the unsuccessful party of his rights under the guaranty of due process and equal protection, where the parties have been fully heard in the regular course of judicial proceedings. We will not devote elaborate attention to the showing an erroneous decision; we will not undertake to demonstrate the obvious. Neither will we attempt to explore, speculatively, the extraneous circumstances and conditions that might have operated to bring about the initial departure and to perpetuate, throughout the litigation, the arbitrary decision that characterized it.*

It will be our purpose to make clear, from the record and from the authorities hereinafter cited, that the Florida courts through their actions, whether explained or explainable, may, under particular circumstances, deprive litigants of life, liberty or property without due process of law. We will show that the case at bar is a glaring example of such cases. We will undertake to show that as a matter of substantive constitutional law, there is at this time no doubt that a state court judgment constitutes "state action" within the purview of the due process and equal protection clauses of the Fourteenth Amendment. And we will undertake to show that both substantive due process and procedural due process, and equal protection, were denied petitioners in the proceedings in the courts of the State of Florida, here complained of.

II

Question: Where a plaintiff in a State Court suit seeks specific performance of an alleged option for the purchase of corporate stock, ignoring the fact that he

* A trial by a biased judge is not in conformity with due process of law. "When the fault of bias and prejudice in a judge first rears its ugly head, its effect remains throughout the whole proceeding." N.L.R.B. vs. Phelps, 5 Cir., 136 F. 2d 562, 563, citing Tumey vs. Ohio, 273 U. S. 510, 47 S. Ct. 437, 71 L. Ed. 749, 50 ALR 1243.

has discharged the optionors by executing to them a valid formal release, and the optionors plead and establish the release as a valid contract, and plaintiff appeals from the decree dismissing his complaint, may the appellate court also entirely ignore and disregard the release, and arbitrarily direct that the option be enforced, thereby depriving the optionors of their personal and property rights without substantive due process of law, contrary to the Fourteenth Amendment?

Discussion: In essence, due process is the protection of the individual against abitrary action. Ohio Bell Telephone Co. vs. Public Utilities Com., 301 U. S. 292, 57 S. Ct. 724, 81 L. Ed. 1100.

If a case between private parties is arbitrarily and capriciously decided, in violation of settled principals of law and contrary to undisputed facts, though the court so deciding had jurisdiction over the suit, the judgment is a violation of the Fourteenth Amendment of the Federal Constitution. Postal Telegraph-Cable Company v. City of Newport, 247 U. S. 464, 38 S. Ct. 566, 62 L. Ed. 1215.

In this last cited case, it was held that where a city, after telegraph lines located in its streets had been conveyed to defendant, recovered a judgmnt against the grantor company for license fees, for use of the street, and defendant was in no way a party to the litigation, the decision of the State court that defendant was concluded by such judgment was erroneus and that it deprived the defendant of its property without due process of law, in violation of the Fourteenth Amendment.

Therein, it was stated that the United States Supreme Court will review a state court decision in order to determine whether the basis of fact upon which the state court rested its decision denying the asserted Federal right has any support in the record. It was said:

"But the question arises, whether the basis of fact upon which the state court rested its decision denying the asserted Federal rights has any support in the record; for if not, it is our duty to review and correct the error. Southern P. Co. v. Schuyler, 227, U. S. 601, 611, 57 L. Ed. 662, 669, 43 L.R.A. (N.S.) 901, 33 Sup. Ct. Rep. 277; North Carolina R. Co. v. Zachery, 232 U. S. 248, 259, 58 L. Ed. 591, 595, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159, 9 N.C.C.A. 109; Carlson v. Washington, 234 U. S. 103, 106, 58 L. Ed. 1237, 1238, 34 Sup. Ct. Rep. 717; Norfolk & W. R. Co. v. (474) West Virginia, 236 U. S. 605, 610, 59 L. Ed. 745, P. U. R. 1915C, 293, 35 Sup. Ct. Rep. 437; Interstate Amusement Co. v. Albert, 239 U. S. 560, 567, 60 L. Ed. 439, 443, 36 Sup. Ct. Rep.168."

"Since the case proceeded to judgment upon the pleadings, it is elementary that every uncontradicted allegation of fact the unsuccessful party must be taken as true."

If a state court case between private parties is arbitrarily and capriciously decided, in violation of settled principals of law and contrary to undisputed facts, to the end that personal rights and property rights are violated and due process of law is not afforded, it cannot be correctly said that the person or persons so discrimnated against, and so deprived of the protection which the Federal Constitution affords them, must either submit or seek redress in an independent action in a Federal court of original jurisdiction, i. e., a district court of the United States. Such a court has no jurisdiction to reverse or modify the judgment of a state court. The errors complained of can be reviewed only by the Supreme Court of the United States. In Rooker v. Fidelity Trust Co., 263 U. S. 413, 44 S. Ct. 149, 68 L. Ed. 362, it was said:

"If the constitutional questions stated in the bill actually arose in the cause, it was the province and duty of the state courts to decide them; and their

> decision, whether right or wrong, was an exercise of jurisdiction. If the decision was wrong, that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding. Unless and until so reversed or modified, it would be an effective and conclusive adjudication. Elliott v. Peirsol, 1 Pet. 328, 340, 7 L. Ed. 164, 170; Thompson v. Tolmie, 2 Pet. 157, 169, 7 L. Ed. 381, 395; Voorhees v. Jackson, 10 Pet. 449, 474, 9 L. Ed. 490, 500; Cornett v. Williams, 20 Wall. 226, 249, 22 L. Ed. 254, 258; Ex parte Harding, 120 U. S. 782, 30 L. Ed. 824, 7 Sup. Ct. Rep. 780. Under the legislation of Congress, no court of the United States other than this court could entertain a proceeding to reverse or modify the judgment for errors of that character."

In Holden v. Hardy, 169 U. S. 366, 18 S. Ct. 383, 42 L. Ed. 780, it was said that due process of law implies at least a conformity with the natural and inherent principles of justice, and that: The privilege of contracting is both a liberty and a property right, and if A is denied the right to contract and acquire property in a manner which he has hitherto enjoyed under the law, and which B, C, and D are still allowed by the law to enjoy, it is clear that he is deprived of both liberty and property to the extent that he is thus denied the right to contract.

It has been stated that in view of the importance of the Fourteenth Amendment, containing a guarantee to the citizen that he will not be deprived of his personal rights and property, and liberty, without due process of law, and protection against arbitrary governmental action, the Amendment should be liberally construed. We mention in this connection Southern Bell Tel. & Tel. Co. v. Calhoun, 287 Fed. 381, 384, 385, setting forth that:

> "The duty of protecting all its citizens in the enjoyment of an equality of rights was assumed by each state upon the adoption of its Constitution, and by the Fourteenth Amendment to the United States Constitution it was further agreed by each state

that the general government should be vested with the supreme power to protect the citizen against the invasion by any state of this pre-existing right, Civil Rights Cases, 109 U. S. 3, 13, 3 Sup. Ct. 18, 27 L. Ed. 835. And it may be stated that no provision of the original Constitution is more in harmony, than this amendment with the supreme purpose of that compact as expressed in its preamble:

> " '*** to establish justice, insure domestic tranquility *** promote the general welfare and secure the blessings of liberty.'

"There was a time when no individual right of property was recognized or existed, but only at and before the dawn of history, when man was an untutored savage. Later on property was taken without due process of law at the will of the strongest, at a time when might overrode right, but only when tyrants of robber barons assumed the prerogatives of unrestrained and unconstiutional government."

The provisions of the Fourteenth Amendment are universal in their application to all persons within the territorial jurisdiction of the United States without regard for any dfferences of race, of color, or of nationality. To invoke the Fourteenth Amendment it is not necessary that petitioners show that they are members of a minority group, or that their nationality, race, or creed subjects them to discrimination. Discrimination may and does result from other causes. Equal protection of laws is a pledge of equal laws, equally administered as to all persons. Truax v. Raich, 239 U. S. 33, 36 Sup. Ct. 7, 60 L. Ed. 131; 27 A. L. R. 375, reversing 20 Ariz. 7, 176 Pac. 570; Yick Wo. v. Hopkins, 118 U. S. 356, 30 L. Ed. 220, 6 Sup. Ct. Rep. 1064.

Equal protection denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the occupations of life. It undoubtedly should include the right to be free from the threat of commitment to jail for contempt when such

threat is unlawfully employed, with present power of fulfillment, for the despicable purpose of coercing the individual to surrender his personal and property rights. It denotes the right of the individual to enjoy all of the privileges long recognized at common law as essential to the orderly pursuit of happiness by free men, and it embraces freedom from unmistakable infringement of rights secured by the fundamental law. Meyer V. Nebraska, 262 U. S. 390, 67 L. Ed. 698, 43 S. Ct. 625, 29 A.L.R. 1446.

The right to contract is a part of the liberty of the individual protected by the due process clause of the Federal constitution. Adkins v. Children's Hospital, 261 U. S. 525, 67 L. Ed. 440; Advance-Rumley Thresher Co. v. Jackson, 287 U. S. 283, 53 S. Ct. 133, 77 L. Ed. 306, 87 A.L.R. 285; Allgeyer v. Louisiana, 165 U. S. 578, 591, 41 L. Ed. 832, 836, 17 Sup. Ct. 427; New York L. Ins. Co. v. Dodge, 246 U. S. 357, 373, 374, 62 L. Ed. 772, 781, 39 Sup. Ct. 337, Ann. Cas. 1918C, 593; Coppage v. Kansas, 236 U. S. 1, 10, 14, 59 L. Ed. 441, 444, 446 L.R.A. 1915C, 960, 35 Sup. Ct. 40; Adair v. United States, 208 U. S. 161, 52 L. Ed. 436, 28 Sup. Ct. 277, 13 Ann. Cas. 764; Lochner v. New York, 198 U. S. 45, 49 L. Ed. 937, 25 Sup. Ct. 539, 3 Ann. Cas. 1133; Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co., 111 U. S. 746, 28 L. Ed. 585, 4 Sup. Ct. 652; Muller v. Oregon, 208 U. S. 412, 421, 52 L. Ed. 551, 555, 28 Sup. Ct. 324, 13 Ann. Cas. 957.

While a judicial decision may not be "law" within the meaning of Article I, Section 10, of the Federal constitution, it is true, nevertheless, that when the decision of the highest court of a state amounts to a willful, capricious, discriminatory and arbitrary disregard of the contractual rights of the individual, due process of law is not afforded. Roberts v. New York, 295 U. S. 264, 55 S. Ct. 689, 79 L. Ed. 1429; Chicago Life Ins. Co. v. Cherry, 244 U. S. 25, 37 S. Ct. 492, 61 L. Ed. 966; Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U. S. 673, 50 S. Ct. 451.

So strictly is the rule against impairing the obligation of contracts to be enforced that the federal courts have, at times, held that the validity and obligation of a contract made under an exposition of the law given by the highest tribunal of the state, as judicially declared at the time the contract was made, cannot be subsequently impaired by a later judicial decision altering the settled construction of the state law under which the contract was finally consummated as an agreement. Douglass v. Pike County, 101 U. S. 677, 25 L. Ed. 968; Gelpcke v. Dubuque, 1 Wal. 175, 17 L. Ed. 520; Louisiana v. Pillsbury, 105 U. S. 278, 26 L. Ed. 1090. But it should be noted that we are not here concerned with a mere impairment of a contract obligation by judicial decision.

In the case at bar, the release became and was a completed and executed contract for which petitioners paid a cash consideration of $10,000, which payment was accepted and retained by Streit. The release, as property of petitioners legally acquired, held and owned, was not subject to being arbitrarily taken from petitioners at the will, caprice or whim of either legislature or judge. No agency of government is vested with such arbitrary and absolute power over the individual, and cannot be vested with such power if our present system of constitutional government is to last. Adkins v. Children's Hospital, 261 U. S. 525, 43 S. Ct. 384, 67 L. Ed. 785, 24 A. L. R. 1238; Advance-Rumely Thresher Co. v. Jackson, 287 U. S. 283, 53 S. Ct. 133, 77 L. Ed. 306, 87 A.L.R. 285. The courts of Florida (except in the present case) have recognized that the constitutions, State and Federal, secure liberty of contract and property rights against arbitrary, capricious and oppressive governmental restraint or confiscation. Miami Laundry Co. v. Florida Dry Cleaning & Laundry Board, 134 Fla. 1, 183 So. 759, 119 A. L. R. 956. Such security must be real and effective, and not illusory.

While a state may, in the exercise of its police power, prohibit and declare invalid the making within

its borders of certain contracts, if such contracts can be said, upon reasonable grounds, to be inconsistent with the public interest or detrimental to the common good, its powers in that field are limited. Hartford Accident & Indemnity Company v. Delta and Pine Land Company, 292 U. S. 143, 54 S. Ct. 534, 78 L. Ed. 1178, 92 A. L. R. 928. And we are not here dealing with a contract (release) of a prohibited nature, or as to which the state has imposed restraints. Neither are we dealing with a contract that has been attacked, as invalid, on any recognized or recognizable ground. On the other hand, our question relates to the power of the state courts to arbitrarily and capriciously disregard the contract of petitioners and the rights which petitioners had purchased and procured thereunder.

It is true that the record here may not disclose, unmistakably, why petitioners were discriminated against, and may not identify and define the whim or vagary that induced the Court to act as it did. Ordinarily, we find in such matters no declaration of intent, but the record itself speaks of the wrong done, as it did in Chambers vs. Florida, 309 U. S. 227, 60 S. Ct. 127, 84 L. Ed. 456, reversing 136 Fla. 568, 187 So. 156, and declaring that all people must stand equally before the bar of justice in every American Court. There, in reversing the Florida Supreme Court, Mr. Justice Black, writing for the Court said:

> "Today, as in ages past, we are not without tragic proof that the exalted power of some governments to punish manufactured crime dictatorially is the handmaid of tyranny. Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement. Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death . . .
> . . . .

The Supreme Court of Florida was in error and its judgment is reversed."

Respondents here were not and are not of a privileged class, such as seamen, infants, or (formerly) married women. They were in no way incompetent. On the other hand, as in Bullock vs. Harwick, 158 Fla. 834, 30 So. 2nd 539, 541:

> "The record tells a tale of two skillful and wary traders in action."

Messrs. Streit and Wallace both were and are stock brokers. They were pursuing the activities of their profession when the agreements, release, etc. were entered into. They have advanced no claim to the contrary.

In option contracts, the optionee makes no promise, but pays cash or gives some other executed consideration. The optionor's promise is enforceable, in spite of lack of mutuality of obligation; but it is not enforcable after rescission by mutual consent and after the consideration for the option has in full been returned to and accepted by the optionee, and after the optionee has discharged the option agreement by formal common law release; as both Messrs. Streit and Wallace well knew at the time of the transaction.

They knew, and do not deny having known, that the (second) option letter of March 9, 1950, marked the beginning of new relationship and of a new agreement as to which a partial accord had been reached, with further negotiations in prospect, as to the voting trust, to complete the arrangement.

The agreement of the parties was, as a matter of law, made in contemplation of Pierce vs. Isaac, 134 Fla. 666, 184 So. 509, 513, stating:

> "The general rule is that competent parties shall have the utmost liberty of contracting and

their agreements voluntarily and fairly made will be upheld and sustained by the courts. All parties sui juris are free to make whatever contract they may choose so long as no fraud or deception is practised and there is no infraction of law. The fact that one of the parties to a contract made a hard bargain will not alone avoid a contract. See Sommers v. Apalachicola Northern R. Co., 85 Fla. 9, 96 So. 151; Continental Casualty Co. v. Bows, 72 Fla. 17, 72 So. 278; Clay v. Girdner, 103 Fla. 135, 138 So. 490; Babel v. Simmons, 100 Fla. 526, 129 So. 777; Newsom v. Acacia Mut. Life Ass'n, 102 Fla. 567, 136 So. 389; Pine Lumber Co. v. Crystal River Lumber Co., 65 Fla. 254, 61 So. 576; Mizell Live Stock Co. v. McCaskill Co., 59 Fla. 322, 51 So. 547; Frissell v. Nichols, 94 Fla. 403, 114 So. 431; Atlantic Coast Line R. Co. v. Beazley, 54 Fla. 311, 45 So. 761; Holmberg v. Hardee, 90 Fla. 787, 813, 108 So. 211; Eubanks v. Southern R. Co., D. C., 244 F. 891; Ireland v. Craggs, 5 Cir., 56 F. 2d 785, 787."

The law of Florida as to the foregoing has not been changed. In the Supreme Court of Florida, in the present case, it was disregarded.

III (A)

Question: Where an appellate court, in arbitrarily reversing the correct decree of a lower court, discloses that it has capriciously elected to ignore and to disregard undisputed facts that lie at the very heart of the controversy and are controlling as to the rights of the litigants, and afterward arbitrarily denies the wronged parties access to remedies provided by statute and by court rules, and which are accorded to others similarly situated, for the correction of the errors committed, to the end that a clear miscarriage of justice results from such discrimination, can it be said that procedural due process has been afforded?

Discussion: The question as to whether procedural due process has obtained in a given case must be deter-

mined by taking into account the purpose of the procedure and its effect upon the rights asserted, under all of the circumstances of the case. Anderson National Bank v. Luckett, 321 U. S. 233, 64 S. Ct. 599, 88 L. Ed. 692, 151

A.L.R. 824. The court there said:

> "What is due process in a procedure affecting property interests must be determined by taking into account the purposes of the procedure and its effect upon the rights asserted and all other circumstances which may render the proceeding appropriate to the nature of the case. Davidson v. New Orleans, 96 U. S. 97, 107, 108, 24 L. Ed. 616, 620, 621; Ballard v. Hunter, supra (204 U. S. 255, 51 L. Ed. 471, 27 S. Ct. 261); North Laramie Land Co. v. Hoffman, supra (268 U. S. 282, 69 L. Ed. 957, 45 S. Ct. 491): Dohany v. Rogers, supra (281 U. S. 369, 74 L. Ed. 912, 50 S. Ct. 299, 68 A.L.R. 434), and cases cited. The fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked."

The Supreme Court of Florida has no absolute and arbitrary power over the liberty, property and contracts of individuals. It has often aptly said that: "Absolute and arbitrary power over the lives, liberty and property of free men exists nowhere in a republic, not even in the largest majority." The usurpation of such arbitrary power by the Florida Courts, flagrantly is shown here, and petitioners should not be without a means by which they can make the rights guaranteed to them by the Fourteenth Amendment effective. There is an available remedy actual in character and not merely theoretical, if we may rely upon the statement of Mr. Justice Frankfurter in Wolf vs. Colorado. There, considering the protection of the Fourth Amendment it was stated at page 28 of 338 U. S., 69 S. Ct. 1631, 93 L. Ed. 1786:

> "But the ways of enforcing such a basic right raise questions . . . . . .

> How such arbitrary conduct should be checked, what remedies against it should be afforded, the means by which the right should be made effective, are all questions that are not to be so dogmatically answered as to preclude the varying solutions which spring from an allowable range of judgment on issues not susceptible of quantitative solution."

The fact that petitioners owned but 136,399 shares of the stock, and that the remainder was owned by Kathryn C. Maule and numerous others, is not determinative of any question with which we are here confronted. The others are not alone affected. Petitioners had the stock voting control of Maule Industries and its management. They had operated the company as its officers from the time of its incorporation, receiving salaries and emoluments that afforded a livelihood, and they were experienced in no other line of work. The confiscatory orders and decrees here complained of deprived them of substantial rights in that behalf. In addition, they were coerced and compelled to commit unlawful acts and wrongful acts with respect to the surrender of the stock certificates of the other owners, in order to avoid commitment to jail under contempt citation, as has been pointed out.

The law is stated in Board of Public Utility Commissioners vs. New York Telephone Co., 271 U. S. 23, 468 S. Ct. 363, 366, 70 L. Ed. 808:

> "Constitional protection against confiscation does not depend on the source of the money used to purchase the property. It is enough that it is used to render the service. San Joaquin & K. R. Canal & Irrig. Co. v. Stanislaus County, 233 U. S. 454, 459, 58 L. Ed. 1041, 1046, 34 Sup. Ct. Rep. 652; Cedar Rapids Gaslight Co. v. Cedar Rapids, 144 Iowa 426, 434, 48 L.R.A. (N.S.) 1025, 138 Am. St. Rep. 299, 120 N. W. 966, affirmed in 223 U. S. 655, 56 L. Ed. 594, 32 Sup. Ct. Rep. 389; Consolidated Gas Co. v. New York (C.C.) 157 Fed. 849, 858, affirmed in 212 U. S. 19, 53 L. Ed. 382, 48 L.R.A. (N.S.) 1134, 29

Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; Ames v. Union P. R. Co. (C. C.) 64 Fed. 165, 176."

The terms "arbitrary", "unreasonable" and "capricious" have a close kinship to each other, and are used in the same sense. Judicial action is arbitrary and capricious when based on no sound concept of reason, and demonstrates a will to rule without regard for the facts which purportedly constitute the basis for the rule. Harris v. State Corp. Commission, 46 N. M. 352, 129 P. 2d 323.

Petitioners have a "standing" to sue to be free from unjustified defamation by wrongful adjudication that they were in contempt. See, in this connection, the case of Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 124, 95 L. Ed. 817, 875. There, in a specially concurring opinion, Mr. Justice Frankfurter said that the deprivation of our citizens of fair trials is a "subversion from within." There was also presented in that case a question as to whether the action challenged affected the petitioner for certiorari with sufficient "directness" to give the petition "standing" before the Supreme Court. As to this, he said:

> "But it is not always true that only the person immediately affected can challenge the action. The fact that an advantageous relationship is terminable at will does not prevent a litigant from asserting that improper interference with it gives him 'standing' to assert a right of action. Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 62 L. Ed. 260, 38 S. Ct. 65, L.R.A. 1918C 497, Ann. Cas. 1918B 461. On this principle an alien employee was allowed to challenge a State law requiring his employer to discharge all but a specified proportion of alien employees. Truax v. Raich, 239 U. S. 33, 60 L. Ed. 131, 36 S. Ct. 7, L.R.A. 1916D 545, Ann. Cas. 1917B 283, and a private school to enjoin enforcement of a statute requiring parents to send their children to public schools, Pierce v. Society of Sisters, 268 U. S. 510, 69 L. Ed. 1070, 45 S. Ct. 571, 39 A. L. R. 468.

> The likelihood that the interests of the petitioner will be adequately protected by the person directly affected is a relevant consideration, compare Columbia Broadcasting System v. United States, 316 U. S. 407, 423, 424, 86 L. Ed. 1563, 1574, 1575, 62 S. Ct. 1194, with Schenley Distillers Corp. v. United States, 326 U. S. 432, 435, 90 L. Ed. 181, 183, 66 S. Ct. 247, as is, probably, the nature of the relationship involved. See Davis & Farnum Mfg. Co. v. Los Angeles, 189 U. S. 207, 220, 47 L. Ed. 778, 781, 23 S. Ct. 498; Truax v. Raich, 239 U. S. 33, 38, 39, 60 L. Ed. 131, 134, 36 S. Ct. 7, L. R. A. 1916D, 545, Ann. Cas. 1917B 293."

Petitioners have been deprived of fundamental rights, both procedural and substantive in quality. Through them the basic rights of others have been taken away or impaired in a manner not consistent with the minimum requirements of due process. Manifestly, a decision of any court purporting to bind by its findings persons who were not parties thereto and who had no notice or right to a hearing in the suit, (such as Kathryn C. Maule and the other third-party owners of securities, here), deprives those persons of property without due process of law and is prohibited by the Fourteenth Amendment, where their property is therein alloted to and ordered delivered to others. Mullane vs. Central Hanover Bank & Trust Co., 339 U. S. 306, 70 S. Ct. 652, 656; Hansberry vs. Lee, 311 U. S. 32, 40, 41, 61 S. Ct. 115, 85 L. Ed. 22, 132 A.L.R. 741; Gratiot County State Bank vs. Johnson, 249 U. S. 246, 248, 249, 39 S. Ct. 263, 63 L. Ed. 587.

As to the third party owners of Maule Industries stock and bonds, namely Kathryn C. Maule, Kathryn King, Eleanor Gerken, Charles King, Jr., Mrs. Helen Tellekamp, T. J. Blackwell, W. H. Walker, Jr., W. L. Gray, Jr., and A. M. Franklin, petitioners also sue here in a derivative and representative capacity. Petitioners had possession of the securities of the third parties named and voting control of the stock. Having been

deprived wrongfully of such possession, as well as of the voting rights under which they maintained management control of the company, a right of action is vested in petitioners with respect to such deprivation. Petitioners "business" is a property right. Duplex Printing Press Co. vs. Deering, 254 U. S. 443, 465, 41 Sup. Ct. 172, 65 L. Ed. 349, 356.

Under Florida law, a plaintiff may maintain an action of trover for the recovery of personal property if he has either title or right of property therein and either possession or the right of immediate possession. Meyers v. Ferris, 91 Fla. 958, 109 So. 209.

Under the law of Florida, a bailee can maintain an action for trover or conversion against a third person, based on a right of possession only, independent of title. We refer to Skinner vs. Pinney, 19 Fla. 42, 54; 45 Am. Rep. 1. There the court said:

> "Nor could the defendant defeat the right of recovery, even if the plaintiff's title rested only in possession and the absolute title was in a third person, for according to the general tenor of authority in this country, the defendant at trover cannot set the title of a third person in defense, unless he, in some manner, connects himself with that title."

With respect to the foregoing, and as to all other phases of this matter, the injuries suffered by petitioners have been wrongs which directly result in the violation of a legal right. Alabama Power Co. vs. Ickes, 302 U. S. 464, 479, 58 S. Ct. 300, 82 L. Ed. 372.

In all respects, the rights which were violated in the state courts of Florida are of the category referred to and come within the rule that the controversy "must be definite and concrete, touching the legal relations of parties having adverse legal interests." Aetna Life Insurance Co. vs. Haworth, 300 U. S., at 240, 241, 57 S. Ct. 461, 81 L. Ed. 621, 108 A. L. R. 1000.

If the state undertakes to afford an adequate remedy against the unjust application, and unconstitutional enforcement of its laws, by its officials and agencies, anyone aggrieved by their acts must exhaust the remedy so provided before he may invoke the aid of the U. S. Supreme Court. But if no adequate remedy is provided by the state, or if the state courts decline to hear the complaint or grant relief, then upon a proper record, such as that presented by petitioners here, the Fourteenth Amendment indicates the action that must result, on petition for certiorari.

The due process of law and equal protection of laws to which the Fourteenth Amendment refers is not confined to the proceedings, orders and judgments of the trial court. Proceedings on appeal in the state court are also included, where appeal is allowed. Here, due process and equal protection of laws were denied petitioners both in the trial and appellate courts. Filer vs. Steele, 241 U. S. 648, 36 S. Ct. 550, 60 L. Ed. 1220; Mooney vs. Holohan, 294 U. S. 103, 55 S. Ct. 340, 79 L. Ed. 791, 98 A.L.R. 406.

To both the citizen and his government the right to contract is the most valuable right known to the law. The Constitution of Florida, as well as the Federal Constitution guarantees its inviolability. State vs. Lehman, 100 Fla. 1313, 131 So. 533. An arbitrary denial of that right by any agency of government, through means not affording the essential requirements of due process, presents a case wherein the jurisdiction of this court may be properly invoked, for its independent determination of the question. We refer to Truax vs. Corrigan, 257 U. S. 312, 42 Sup. Ct. 124, 66 L. Ed. 254, as follows:

> "In cases brought to this court from state courts for review, on the ground that a Federal right set up in the state court has been wrongly denied, and in which the state court has put its decision on a finding that the asserted Federal right has no basis in point of fact, or has been waived or

lost, this court, as an incident of its power to determine whether a Federal right has been wrongly denied, may go behind the finding to see whether it is without substantial support. If the rule were otherwise, it almost always would be within the power of a state court practically to prevent a review here. Kansas City Southern R. Co. v. H. Albers Commission Co., 223 U. S. 573, 591, 593, 56 L. Ed. 556, 565, 566, 32 Sup. Ct. Rep. 316; Cedar Rapids Gaslight Co. v. Cedar Rapids, 223 U. S. 655, 668, 669, 56 L. Ed. 594, 604, 32 Sup. Ct. Rep. 389; Southern P. Co. v. Schuyler, 227 U. S. 601, 611, 57 L. Ed. 662, 669, 43 L.R.A. (N.S.) 901, 33 Sup. Ct. Rep. 277. Another class of cases in which this court will review the finding of the court as to the facts is when the conclusion of law and findings of fact are so intermingled as to make it necessary, in order to pass upon the question, to analyze the facts. Northern P. R. Co. v. North Dakota, 236 U. S. 585, 593, 59 L. Ed. 735, 740, L.R.A. 1917F, 1148, P. U. R. 1915C, 277, 35 Sup. Ct. Rep. 429, Ann. Cas. 1916A, 1; Jones Nat. Bank v. Yates, 240 U. S. 541, 552, 553, 60 L. Ed. 788, 797, 798, 36 Sup. Ct. Rep. 429."

Here, the federal question arose for the first time from the unanticipated disposition of the case at the close of the proceedings in the Florida Supreme Court on the first appeal. At each successive step in the proceedings in the state court thereafter, petitioners appropriately raised the questions, now presented, but were in each instance flatly denied the right to be heard. Their "standing" for the presentation of their pending petition has not been lost. See Brinkerhoff-Faris Trust & Savings Co. vs. Hill, 281 U. S. 673, 678, 50 S. Ct. 451, 74 L. Ed. 1107, 1112 and American Surety Co. vs. Baldwin, 227 U. S. 156, 53 S. Ct. 98, 77 L. Ed. 231, 86 A.L.R. 298.

While the right of appeal may not be essential to due process of law, yet, if an appeal is allowed to some persons and not to all persons similarly situated, such

deprivation of the right to an appeal is equivalent to the denial of due process of law and equal protection of the laws are secured only when "the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government." The discriminatory denial of the statutory right of appeal was a violation of petitioners' rights under the equal protection clause of the Fourteenth Amendment. Duncan vs. Missouri, 152 U. S. 377, 382, 14 Sup. Ct. 570, 38 L. Ed. 485; Cochran v. Kansas, 316 U. S. 255, 62 S. Ct. 1068, 86 L. Ed. 1453, and Dowd v. U. S. ex rel. Cook, 340 U. S. 206, 71 S. Ct. 262, 95 L. Ed. 215, 19 A.L.R. 2d 784.

Whether the taking of property or personal rights is under a judgment, order or administrative regulation, the defendant must not be denied the right to show that, as a matter of law, the ruling was so arbitrary, unjust, or unreasonable as to amount to a deprivation of property in violation of the Fourteenth Amendment. Washington ex rel. Oregon R. Nav. Co. v. Fairchild, 224 U. S. 510, 32 Sup. Ct. 535, 56 L. Ed. 863, reversing 52 Wash. 17, 100 Pac. 179; Chicago, M. & Sp. P. R. Co. v. Minnesota, 134 U. S. 418, 10 Sup. Ct. 462, 33 L. Ed. 970, reversing 38 Minn. 281, 37 N. W. 782; Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418; 42 L. Ed. 819; Chicago, M. & St. P. R. R. Co. v. Tompkins, 176 U. S. 167, 173, 20 S. Ct. 336, 44 L. Ed. 417.

If the judge of a trial court, in carrying out what he either arbitrarily or in good faith believes to be the mandate of the Supreme Court of the State, denies a litigant due process and equal protection, and the wronged individual therafter exhausts all of the possible remedies, or possibility of remedy, in the state courts, without success, it does not matter, after as a last resort the jurisdiction of the United States Supreme Court has been invoked whether the primary wrong and moral responsibility rests upon the trial judge or the appellate justices.

It will of course be borne in mind that the bill of

complaint of Streit and Wallace was not for the rescission and cancellation of the release of the option. The bill (R. 12), as has been stated, contained no reference to the instrument of release. The release was ignored in the original bill of complaint, and the bill was at no time amended. The validity of the release was not put at issue in any manner or at any time, as has been shown, and the rule of Florida on this point is of interest.

In Standard Lumber Co. vs. Industrial Co., 106 Fla. 834, 141 So. 729, 734, it was said:

> "The burden of pleading and proving fraudulent misrepresentations as a ground for rescission and cancellation of the agreement was on the appellant as the party seeking to avoid the contract on such ground. Pryor v. Oak Ridge Develop. Corp., 97 Fla. 1085, 119 So. 326; Lee v. Clearwater Growers' Ass'n, 93 Fla. 214, 111 So. 722; Stokes v. Victory Land Co., 99 Fla. 795, 128 So. 408; Sebring Co. v. Skinner, 100 Fla. 315, 129 So. 759."

The power of a court of equity to rescind and cancel a contract, while well recognized, is somewhat exceptional in its nature, and a bill of complaint invoking the exercise of this power must be clear and explicit in its allegations of facts showing the requisite equitable grounds for the relief in that behalf prayed for. Willis vs. Fowler, 102 Fla. 35, 136 So. 358.

Manifestly, a valid and binding contract of release is not subject to being ignored and thereby rescinded or annulled, in the manner and method here attempted. When such action is disclosed, it can but be characterized as arbitrary, capricious, and contrary to due process. Manifestly, the court cannot without either allegation or proof, by any process of "presumption" hold that such a release is invalid.

In the absence of an allegation that the execution of the release was "spurious", or that it was obtained

by fraud, and without evidence to support such a claim or an opportunity to be heard in opposition thereto, a judgment or decree invalidating it would be a nullity, and so the court ignored and disregarded the release, and in that unlawful manner sought to destroy its effect. The flagrant error of such action is indicated by Sylvan Beach, Inc., vs. Koch, (8 Cir.) 140 F. 2d 852, 861, pointing out that:

> "In the absence of (1) notice to a party of the claim made against him, and (2) of a hearing or an opportunity to be heard in opposition thereto, a judgment entered upon the claim is a nullity. Galpin v. Page, 85 U. S. 350, 18 Wall. 350, 368, 369, 21 L. Ed. 959; Windsor v. McVeigh, 93 U. S. 274, 277, 278, 23 L. Ed. 914; Coe v. Armour Fertilizer Works, 237 U. S. 413, 423, 35 S. Ct. 625, 59 L. Ed. 1027; Twining v. State of New Jersey, 211 U. S. 78, 110, 111, 29 S. Ct. 14, 53 L. Ed. 97; Ochoa v. Hernandez, 230 U. S. 139, 161, 33 S. Ct. 1033, 57 L. Ed. 1427; Postal Telegraph Cable Co. v. City of Newport, 247 U. S. 464, 38 S. Ct. 566, 62 L. Ed. 1215; Truax v. Corrigan, 257 U. S. 312, 332, 42 S. Ct. 124, 66 L. Ed. 254, 27 A.L.R. 375; Gentry v. United States, 8 Cir. 101 F. 51; In re Rosser, 8 Cir. 101 F. 562, 567, 570; In re Noell, 8 Cir., 93 F. 2d 5, 6, 7.
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> A court may not, without the consent of all persons affected, enter a judgment which goes beyond the claim asserted in the pleadings, Standard Oil Co. v. State of Missouri, 224 U. S. 270, 281, 34 S. Ct. 406, 56 L. Ed. 760, Ann. Cas. 1913D, 936; Barnes v. Chicago, M. & St. P. R. Co., 122 U .S. 1, 14, 7 S. Ct. 1043, 30 L. Ed. 1128; Reynolds v. Stockton, 140 U. S. 254, 265, 266, 11 S. Ct. 773, 35 L. Ed. 464; Clark v. Arizona Mut. Savings & Loan Ass'n, D. C., 217 F. 640, 642-644; Gentry v. United States, 8 Cir., 101 F. 51."

On page 862:

> "The foregoing rules are all fundamental and state nothing more than the essentials of due process and of fair play. They assure to every person

his day in court before judgment is pronounced against him. They cannot be circumvented by allowing amendments to pleadings to change a cause of action after judgment or by giving notice of the entry of judgment or by entertaining motions to vacate a judgment after it has been entered."

Affirmative relief may not be afforded upon the ground of fraud, unless it be made a distinct allegation in the bill, so that it may be put in issue. Noonan vs. Lee, 2 Black 499, 17 L. Ed. 278; Moss. vs. Riddle, 5 Cranch 351, 357, 3 L. Ed. 123; Patton vs. Taylor, 7 How. 132, 12 L. Ed. 637; Stockton vs. Ford, 11 How. 232, 246, 13 L. Ed 676; Very vs. Levy, 13 How. 345, 362, 14 L. Ed. 173; Eyre vs. Potter, 15 How. 42, 14 L. Ed. 592; Magniac vs. Thomson, 15 How. 281, 14 L. Ed. 696; Moore vs. Greene, 19 How. 69, 15 L. Ed. 533; Beaubien vs. Beaubien, 23 How. 190, 16 L. Ed. 484; New Albany vs. Burke, 11 Wall. 96, 106, 20 L. Ed. 155; Voorhees vs. Bonesteel, 16 Wall. 16, 21 L. Ed. 268; United States vs. Colorado Anthracite Co., 225 U. S. 219, 32 S. Ct. 617, 56 L. Ed. 1063.

A complaint upon fraud and coercion to overcome a release of the claim sued on, must state distinctly the particular acts, specifying by whom and in what manner they were perpetrated, so that the court may see that, if proven it would be warranted in setting aside the instrument of release. Chamberlin Mach. Wks. vs. United States, 270 U. S. 347, 46 S. Ct. 225, 70 L. Ed. 619. Adequate allegations are essential. Chicago Burlington & Quincy R. Co. vs. Babcock, 204 U. S. 585, 592, 51 L. Ed. 636.

In the last cited case, Mr. Justice Holmes said:

"The charge of fraud, even if adequately alleged (Missouri v. Dockery, 191 U. S. 165, 170, 48 L. Ed. 133, 134, 24 Sup. Ct. Rep. 53), was very slightly pressed at the argument, and totally fails on the facts. Such charges are easily made and, it is to be feared, often are made without appreciation of the responsibility incurred in making them."

Can it be said here that an individual may be convicted of fraud, and that his personal and property rights may be stripped from him on the basis of such a conviction, where he has not been charged with fraud, where there has been no evidence of fraud, and where the trier of the facts has acquitted him of wrong doing? Where such a conviction is properly resisted on the basis of an absence of due process, and the individual is absolutely denied in a state court the right to be heard in regard thereto, and is not permitted to say, (although he repeatedly, appropriately and in every conceivable manner attempts to do so), that the Fourteenth Amendment of the Federal Constitution has been violated, will not the United States Supreme Court intervene on the basis of Postal Telegraph-Cable Co. vs. City of Newport, 247 U. S. 464, 38 S. Ct. 566, 62 L. Ed. 1215, to correct the error of the state court in resting its decision denying asserted Federal rights upon a basis of fact which has no support in the record? Will not this Court say that due process of law and equal protection of laws have not been accorded?

It is respectfully submitted that these questions point to the unavoidable duty existing, and show the existence here of a substantial Federal question.

III (B)

Question: Ancillary to the foregoing is the question of due process presented by the action of the State Court in making its judgment conclusive on the absent parties. Could both the Circuit Court and the Florida Supreme Court deny them the right to be heard?

Discussion: It has been shown that the Circuit Judge, being fully informed as to the actual ownership of the "third party" stock and bonds, and knowing that the owners were not successors in interest or in privity with any of the parties to the suit, summarily required that the said securities be delivered to Streit, without

the service of any process on the third parties and without hearing, threatening petitioners with commitment to jail, as for contempt, upon failure to comply with the order. The Supreme Court of Florida declined to review the order or grant any relief.

The making of the judgment in that regard conclusive on the absent parties constituted a denial of due process. The interests of the third persons, who were not parties to the litigation, and who were purportedly bound by the judgment, were not insured or protected. Their interests were disregarded; their rights were violatd.

The enforcement of a judgment against the person or property of one not designated as a party nor made a party by the service of process violates the due process clause of the Fourteenth Amendment. Hansberry vs Lee, 311 U. S. 32, 61 S. Ct. 115, 85 L. Ed. 22, 132 A. L. R. 741, (reversing 372 Ill. 369, 24 N. E. 2d 37):

> "State courts are free to attach such descriptive labels to litigations before them as they may choose and to attribute to them such consequences as they think appropriate under state constitutions and laws, subject only to the requirements of the Constitution of the United States. But when the judgment of a state court, ascribing to the judgment of another court the binding force and effect of res judicate, is challenged for want of due process it becomes the duty of this Court to examine the course of procedure in both litigations to ascertain whether the litigant whose rights have thus been adjudicated has been afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes. Western Life Indem. Co. v. Rupp, 235 U. S. 261, 273, 59 L. Ed. 220, 224, 35 S. Ct. 37.
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> "It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he

is not designated as a party or to which he has not been made a party by service of process. Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565; 1 Freeman, Judgments, 5th ed. §407. A judgment rendered in such circumstances is not entitled to the full faith and credit which the Constitution and statute of the United States, Rev. Stat. §905, 28 U. S. C. A. §687, prescribe, *Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565, supra; Lafayette Ins. Co. v. French, 18 How. (U. S.) 404, 15 L. Ed. 451; Hall v. Lanning, 91 U. S. 160, 23 L. Ed. 271; Baker v. Baker, E. & Co. 242 U. S. 394, 61 L. Ed. 386, 37 S. Ct. 152, and judicial action enforcing it against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments require. Postal Teleg. Cable Co. v. Newport, 247 U. S. 464, 62 L. Ed. 1215, 38 S. Ct. 566; Old Wayne Mut. Life Asso. v. McDonough, 204 U. S. 8, 51 L. Ed. 345, 27 S. Ct. 236."

The Courts of Florida had no authority, right, or jurisdiction whatsoever to enforce against the "third persons" an agreement that did not exist, and through such lawless "enforcement" to destroy personal and property rights. And, as has heretofore been mentioned, it avails nothing to say that as to Kathryn C. Maule and the other third persons the judgment here complained of is void and hence unenforceable. It has already been unlawfully enforced, fully, and property consisting of negotiable securities has been transferred to J. Bradley Streit, respondent, under such conditions that those securities can be recovered, and the retransfer thereof to the rightful owners can be compelled only through the intervention of this Court. If this Court does not vacate and set aside the judgment under which "title" to the securities in question is held, the true owners will have no practical remedy and no actual means of redress available, even though theoretical and illusory remedies otherwise may be suggested.

The Unitd States Supreme Court has repeatedly declared that due process guaranteed by the Federal

Constitution requires a trial in a state court, conforming to the fundamental conceptions of justice which lie at the base of our civil and political institutions, and that if the state supplies no corrective process the federal courts will intervene to protect the life or liberty of the citizen from a judgment where the trial is not conducted according to such standards. Mooney v. Holohan, 294 U. S. 103, 55 S. Ct. 340, 79 L. Ed. 791, 98 A. L. R. 406; Frank v. Mangrum, 237 U. S. 309, 35 S. Ct. 582, 59 L. Ed. 969; Moore v. Dempsey, 261 U. S. 86, 43 S. Ct. 265, 67 L. Ed. 543.

We can but construe these cases to mean that, where the state does not provide corrective judicial process, the federal courts will review upon the assertion of substantial error involving due process.

The mere naked theoretical right to a review for error is not sufficient. The right must actually be made available for the purposes for which it is granted. The right to a review is but a hollow grant to one who cannot avail himself of it, as was the case here in respect to the third person-owners. Petitioners, even, were not heard as to their separate rights. As to them, a right, absolute in character, to be heard on appeal by the Florida Supreme Court was provided for by statute, but that right proved to be illusory. Their appeal was summarily dismissed, without hearing on the day it was filed, as we have shown.

IV

Question: Can it be said that petitioners are not entitled to protection under the Fourteenth Amendment because, the taking from petitioners by judicial decree of the negotiable securities, of enormous value, of which petitioners had possession and under which they held "rights", was not "state action" within the meaning of the due process and equal protection clauses?

Discussion: There is now no doubt that a state

court judgment constitutes "state action" within the purview of the due process clause of the Fourteenth Amendment and that such a judgment may, under particular circumstances, deprive a litigant of life, liberty or property, without regard for the minimum requirements of law. See American Federation of Labor vs. Swing, 312 U. S. 321, 61 S. Ct. 568, 85 L. Ed. 855 and Shelley v. Kraemer, 334 U. S. 1, 68 S. Ct. 836, 92 L. Ed. 1161.

Action by any division, department or branch of the state, including the judicial branch, is state action within the meaning of the Fourteenth Amendment. Ex parte Virginia, 100 U. S. 339, 25 L. Ed. 676; Virginia vs. Rives, 100 U. S. 313, 25 L. Ed. 667; Mooney v. Hohohan, 294 U. S. 103, 55 S. Ct. 340, 79 L. Ed. 791, 98 A. L. R. 406; Twining v. New Jersey, 211 U. S. 78, 29 S. Ct. 14, 53 L. Ed. 97.

A judicially established rule is subject to the same constitutional limintations as those established by the state legislature. Chicago B. & Q. R. Co. vs. Chicago, 166 U. S. 226, 17 S. Ct. 581, 41 L. Ed. 979, 984, 985:

Page 984:

> "But a state may not, by any of its agencies, disregard the prohibitions of the 14th Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that Amendment. In determining what is due process of law regard must be had to substance, not to form."

Page 985:

> "The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process

of law, if the necessary result be to deprive him of his property without compensation."

In the case of Shelley vs. Kraemer, 334 U. S. 1, 68 S. Ct. 836, 92 L. Ed. 1161, supra, Mr. Chief Justice Vinson, writing for the court, said:

> "That the action of state courts and of judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court. That principle was given expression in the earliest cases involving the construction of the terms of the Fourteenth Amendment. Thus, in Virginia v. Rives, 100 U. S. 313, 318, 25 L. Ed. 667, 669 (1880), this Court stated: 'It is doubtless true that a State may act through different agencies, either by its legislative, its executive, or its judicial authorities; and the prohibitions of the amendment extend to all action of the State denying equal protection of the laws, whether it be action by one of these agencies or by another.' In Ex parte Virginia, 100 U. S. 339, 347, 25 L. Ed. 676, 679 (1880), the Court observed: 'A State acts by its legislative, its executive or its judicial authorities. It can act in no other way.' In the Civil Rights Cases, 109 U. S. 3, 11, 17, 27 L. Ed. 835, 839, 841 (1883), this Court pointed out that the Amendment makes void 'State action of every kind' which is inconsistent with the guaranties therein contained, and extends to manifestations of 'State authority in the shape of laws, customs, or judicial or executive proceedings.' Language to like effect is employed no less than eighteen times during the course of that opinion.
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> "Similar expressions, giving specific recognition to the fact that judicial action is to be regarded as action of the State for the purposes of the Fourteenth Amendment, are to be found in numerous cases which have been more recently decided."

A legal essayist, by way of law journal comment, has recently said that: "Those who look to the Govern-

ment for protection or gain have long recognized the comparative inadequacy of individual action." Undoubtedly there are those among us who believe that the citizens of this country do not fully enjoy their rights under the Constitution, and may be deprived of them, unless a pressure group fights for them. This cannot be true, for if the rights of the individual are not worth preserving, for the sake of the individual, then constitutional government, as we know it, is doomed. Protection through pressure groups was not within the contemplation of the framers of the Constitution.

In the case of Rochin vs. California, 96 L. E. 154, (Advance Sheets for Jan. 14, 1952), Mr. Justice Frankfurter, writing for the Court, stating that regard for the requirements of constitutional due process imposes upon the Supreme Court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offended those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with heinous offenses, said:

> "However, this Court too has its responsibility. Regard for the requirements of the Due Process Clause 'inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings (resulting in a conviction) in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.' Malinski v. New York, supra, at 416-417. These standards of justice are not authoritatively formulated anywhere as though they were specifics. Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental,' Snyder v. Massachusetts, 291 U.S. 97, 105, or

are 'implicit in the concept of ordered liberty.' Palko v. Connecticut, 302 U.S. 319, 325."

In the earlier case of Haley vs. Ohio, 332 U. S. 596, 68 S. Ct. 302, 92 L. Ed. 224, 230, Mr. Justice Frankfurter mentioned that though subtle, and even elusive, as the criteria of due process are, the Supreme Court cannot escape the duty of determining whether due process has been denied by state action. It is there written:

> "The doubts and difficulties derive from the very nature of the problem before us. They arise frequently when this Court is obliged to give definiteness to 'the vague contours' of Due Process, or, to change the figure, to spin judgment upon State action out of that gossamer concept. Subtle and even elusive as its criteria are, we cannot escape that duty of judicial review."

It is respectfully submitted that in the case at bar the duty is clear and that the criteria of want of due process in the State Court proceedings are not as elusive or uncertain as those discussed in the Haley case.

We are not here dealing with mere processes of trial and error, or of change of decision by a state court in order to conform with changing ideas and conditions. We are not confronted with a decision that has merely "overruled" earlier decisions without offending constitutional guaranties. None of the decisions or rulings of the Florida courts, here challenged, has changed any rule of substantive law or procedure. No earlier Florida decision has been altered or overruled. On the other hand, petitioners have been deprived of fundamental rights by reason of wilfull disregard for the established rules of law, as to procedure and substance without the rules themselves being in any way called into question. Petitioners have been arbitrarily denied rights to which other litigants are entitled, and which other litigants similarly situated are universally accorded. The result has been a miscarriage of justice for want of due process and equal protection of laws.

V

Question: Does the record of this cause contain a basis for the correct assertion that he third party owners of the negotiable securities, who have been deprived of their property without due process, alone can complain?

Discussion: We have shown how petitioners, individually, have been denied due process both procedurally and substantively.

It should be borne in mind that Kathryn C. Maule and the other third party owners of the larger part of the stock and bonds have, by reason of the state court action, been deprived of any means of recapturing their property, or of obtaining redress, except through petitioners, as their representatives herein.

The first mortgage bonds of Maule Industries, Inc. are "bearer" bonds. They have been turned over to J. Bradley Streit, respondent, who is a citizen and resident of Canada, under order of the Circuit Court of Dade County, and the Florida Supreme Court has declined to grant relief.

Under identical circumstances, delivery of the stock, and transfer thereof to Streit has been compelled. Streit in turn has placed these securities in the hands of McDonald & Co. of Cleveland, Ohio, a firm of investment brokers who succeeded to the position of Allen & Co. of New York in the transaction, and who financed the tender of the "purchase price" into the registry of the Circuit Court on November 29, 1951, as shown. Streit's role is that of opportunist.

Section 612.18, Florida Statutes, provides:

> "Stock personal property.—The shares of stock in every corporation shall be personal property, and

shall be transferrable on the books of the corporation in such manner and under such regulations as may be provided in the by-laws. The delivery of a certificate of stock in a corporation to a bona fide purchaser or pledgee for value together with a written transfer of the same or a written power of attorney to sell, assign and transfer the same, signed by the owner of the certificate, shall be a sufficient delivery to transfer the title against all parties except the corporation. No transfer of stock shall be valid against the corporation, its stockholders (other than the transferor) and its creditors for any purpose except to render the transferee liable for debts of the corporation to the extent provided in this chapter until it shall have been registered upon the corporation's books."

It will be seen, accordingly, that unless relief is granted herein, the stock and the bonds may be negotiated to innocent purchasers, and the rights of the third party owners will be lost. They may have a theoretical cause of action for damages against Mr. Streit, in Canada, but such a right could hardly be classed as an adequate remedy, in view of the adjudications of the Florida courts, here under attack.

This Court has jurisdiction to review the Federal question presented in the foregoing connection, and to set aside the decision of the Circuit Court of Dade County, (which the Supreme Court of Florida refused to review), because the Circuit Court entertained original jurisdiction of a question of fact, of which there was no trial in the court below. Wilson vs. Black Bird Creek Marsh Co., 2 Pet. 245, 7 L. Ed. 412, 414; Satterlee vs. Matthewson, 2 Pet. 380, 409, 7 L. Ed. 458, 467; Craig vs. Missouri, 4 Pet. 410, 416, 7 L. Ed. 903, 905; Davis vs. Packard, 6 Pet. 47, 48, 8 L. Ed. 314, 315; Crowell vs. Randell, 10 Pet. 391, 397, 9 L. Ed. 467, 469; Bridge Properties vs. Hoboken Land & Imp. Co., 1 Wall. 116, 141, 17 L. Ed. 571, 575; Sayward vs. Denny, 158 U.S. 184, 39 L. Ed. 942, 15 S. Ct. 777.

VI

Question: Can it be held that the Supreme Court of Florida has accorded petitioners procedural due process and equal protection of laws when it abandoned the rules by which it has always been governed, and for this case, made and applied new contrary rules, not applicable to others?

Discussion: The findings of a Circuit Judge, (as a Chancellor), on questions of fact, when the testimony is taken before him directly, are entitled to the same weight as the verdict of a jury, in Florida, and if there is competent evidence which, if believed by the Chancellor, will support his findings, that will not be disturbed on appeal. This rule has obtained in Florida from the beginning. Boshier vs. Moeller, 83 Fla. 10, 91 So. 181; Cobb vs Cobb, 82 Fla. 287, 89 So. 869.

In the Boshier case, supra, the Syllabus by the Court is as follows:

> "The findings of a chancellor on questions of fact when the testimony is taken before him are entitled to the same weight as the verdict of a jury, and if there is competent evidence, which, if he believed, will support his findings, they will not be disturbed, unless clearly erroneous."

In our present case, the Supreme Court of Florida, disregarded the stated rule. It in no way revoked the rule, and so no question of uniformity of decision is presented. On the other hand, the Supreme Court of Florida did arbitrarily depart procedurally, from the rule stated, and by reason of whim or caprice, applied a contrary rule, not applicable to other litigants so situated.

In interpreting the so-called second option, as contained in the letter by agreement of March 9, 1950, the Court also capriciously departed from rules that are established in the law of Florida. In this connection, we

refer to Camichos v. Diana Stores Corporation, 157 Fla. 349, 25 So. 2d. 864, 868, supra, in which the plaintiff sought to enforce a provision of the lease involved to the effect that plaintiff, as lessee, should have the refusal of the property for an additional term at a rental and on terms to be agreed upon between the parties, meant, it was held, exactly what it said, and that within the time referred to, the lessee had a prior right, somewhat in the nature of an option, to negotiate with the lessor for a renewal, but that if the parties did not agree, the Court could not write a new contract for them, as they were sui juris and competent to make their own contract. The Court also pointed out that the case presented was not one for reformation of the renewal clause, so as to make it conform to an alleged oral agreement, in the absence of any allegation of fraud, deception, mistake, or over-reaching. The Court said:

"In Fletcher v. Moriarty, 62 Fla. 486, 56 So. 437, we held that:

> " 'Verbal agreements as to the terms of a lease of lands cannot vary or control the terms and meaning or effect of the lease as subsequently reduced to writing.'

"See also Swisher v. Conrad, 76 Fla. 644, 80 So. 564.

"(3, 4) Paragraph 12 of the lease was in plain and unambiguous language and, therefore, must be construed as the Chancellor construed it, to mean just what the language used therein implies and nothing more.

"(5) It is immaterial that the provisions of Section 12 are such that no relief may be had in equity thereunder. The parties were all sui juris and competent to make their own contracts. It is not within the province of the court to write a new contract for the parties. See Gross v. Hammond, 123 Fla. 471, 167 So. 373; Id., on later appeal, 138 Fla. 20, 188 So. 789. See also State ex rel. Johnson

v. Blair, 351 Me. 1072, 174 S. W. 2d 851; Frierson v. Grant, 23 Tenn. App. 428, 134, S.W. 2d 193; Thomas Hinds Lodge v. Presbyterian Church, 103 Miss. 130, 60 So. 66; Salem Lodge No. 70, K. of P. v. Smith, 94 W. Va. 718, 120 S.E. 895; Streit v. Fay, 230 Ill. 319, 82 N.E. 648, 120 Am. St. Rep. 304; R. J. Reynolds Realty Co. v. Logan et al., 216 N. C. 26, 3 S.E. 2d 280."

The foregoing was reiterated in Topper v. Alcazar Operating Co., 160 Fla. 421, 35 So. 2d 392, 394, supra, where the Court, speaking through Mr. Justice Chapman, said:

". . . Likewise, it is fundamental that specific performance will not be enforced where the contract is not definite and certain as to essential terms and provisions and is incapable of being made so by the aid of legal presumption or evidence of established customs. Rhode v. Gallat, 70 Fla. 536, 70 So. 471; Maloy v. Boyett, 53 Fla. 956, 43 So. 243.

"The case of Camichos v. Diana Stores Corporation, 157 Fla. 349, 25 So. 2d 864, 868, involved the following renewal provision of a lease, viz.: '12. It is agreed by and between the parties hereto that the lessee shall have the refusal of the property for an additional term at a rental and term to be agreed upon between the parties.' We held that this provision of the renewal lease was too indefinite to be enforced in an action for specific performance. See Gulf Theatres Inc. v. Guardian Life Ins. Co., 157 Fla. 428, 26 So. 2d 188.

"It is established that specific performance will not be enforced where the contract is not definite and certain as to essential terms and provisions and is incapable of being made so by the aid of legal presumption or evidence of established customs. Rhode v. Gallat, supra. The basis for this ruling is that courts are not authorized to write contracts for litigants and supply material terms or provisions omitted by the parties. Section 725.01 F.S.A. (being

the Statute of Frauds), requires certain instruments to be in writing . . ."

At this point, we wish to pause to again mention that in the case at bar the Chancellor specifically found that the parties were acting in good faith. His findings and conclusions (R. 198) recite:

"I find no basis in the evidence for a finding that King and his associates, in refusing to accept and effectuate the terms (of a voting trust) proposed by Streit and Wallace, were motivated by bad faith or that such refusal was capricious.

"There is a violent conflict in the testimony as to the terms which were discussed on the night the agreement of March 9, 1950, was executed. Streit and Wallace testified that the discussion contemplated their being two of three voting trustees; that there was no disagreement as to the terms of the instrument by which the voting trust was to be created; and that the only unsettled detail was the selection by King and his associates of the third trustee. King, on the other hand, testified that he and his associates did not agree that Streit and Wallace were to be two of three trustees and to have the power to control and dictate the voting of the stock; that such a trusteeship would have militated against their desire and purpose to retain their corporate offices and managerial control; and that the duration of the trust and other important details were left unsettled when the agreement was executed.

"It is unnecessary to determine which of the two conflicting versions is correct. I do not find that any of the litigants acted in bad faith. The good faith of each is assumed. Unfortunately, they have not agreed on the terms of a voting trust. Because of their inability to do so a condition on which the obligation of King and associates to sell was and is dependent has not been satisfied.

> "To decree specific performance the court necessarily would have to draft for the parties and require their compliance with a contract which they did not make. This the court cannot do."

The quoted matter obviously relates to the second (abandoned) option agreement. What of the first option and the unconditional release thereof? What "evidence" did the Supreme Court of Florida "rely upon" in order to "disregard" the release?

As we have shown, petitioners repeatedly tried in vain, by application to the Florida Supreme Court for rehearing (R. 206), by appeal (R. 199) and by petitions for certiorari (R. 1, 31, 274, 281, 309) to ascertain what evidence the court relied upon, and was controlled by, in making its stated determination. Such evidence is not in the record. It is nonexistent.

There is no hearing, in the sense of due process, when the affected party has not the means of knowing what evidence is offered or considered and is not afforded an opportunity to test, explain or refute it. And, in the absence of a default, a finding without evidence is arbitrary and baseless. Interstate Commerce Commission vs. Louisville & N. R. Co., 227 U. S. 88, 33 S. Ct. 185, 57 L. Ed. 431; Snyder vs. Massachusetts, 291 U. S. 97, 54 S. Ct. 330, 78 L. Ed. 674, 90 ALR 575.

The release was a valid contract, complete in all details, and voluntarily entered into by competent parties. It was not subject to being varied by parol testimony, in the first place, and in the second place, there was no testimony upon which to vary that contract, in the absence of the rule. The same thing is true as to the second option, but, as we have shown that option was later abandoned.

VII

Question: Were the threats of jail commitment, to accomplish the delivery of securities owned by third

persons, and the final adjudication of contempt against petitioners invasions of the personal rights guaranteed to them by the Fourteenth Amendment?

Discussion: We have quoted in an earlier part hereof Florida Equity Rule No. 67, Sec. 63.37 Florida Stats., under which the final decree of Nov. 15, 1951, was drawn and entered, and the quoted provisions disclose that if petitioners had failed to comply with the decree, they would have been subject to commitment to the common jail, by order of the Clerk of the Circuit Court, prior to hearing of any kind. Such commitment would have involved the usual "mugging", and fingerprinting.

By refusing to permit petitioners to make, in advance a showing as to the extent to which they could lawfully and rightfully comply with the decree, to avoid the stated consequences, the Circuit Judge denied them due process, and compelled them under duress to commit wrongs. The statutory rule is itself in conflict with the due process clause, for it provides that allegedly offending individuals may be placed in jail without hearing.

We refer to Ex parte Ratliff, 117 Tex. 325, 3 S. W. 2d 406, 57 ALR 541, where the accused was charged with having disposed of notes in violation of a temporary restraining order, and had not been heard. It was said:

> "The judgment is a nullity under a long and unbroken line of decisions of both the Supreme Court and the Court of Criminal Appeals. Ex parte Ireland, 38 Tex. 351; Ex parte Testard, 101 Tex. 251, 106 S.W. 319; Ex parte Lipscomb, 111 Tex. 418, 239, S. W. 1101; Ex parte Kilgore, 3 Tex. App. 247; Ex parte Foster, 44 Tex. Crim. Rep. 423, 60 L.R.A. 631, 100 Am. St. Rep. 866, 71 S.W. 594; Ex parte Landry, 65 Tex. Crim. Rep. 440, 144 S.W. 965; Ex parte Duncan, 78 Tex. Crim. Rep. 447, 2 A.L.R. 222, 182 S.W. 313; Ex parte O'Fiel, 93 Tex. Crim. Rep. 214, 246 S. W. 664.

"The Supreme Court of the United States determined, in Cooke v. United States, 267 U.S. 535, 69 L. Ed. 773, 45 Sup. Ct. Rep. 390, that not only must the offender have notice and a trial in every contempt proceeding where the court's judgment is based even in part on the testimony of others, but that due process requires such notice and trial although the court had information of the contumacy 'by confession of the party.' In Cooke v. United States, supra, the court by Chief Justice Taft, said:

" 'Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel, if requested, and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed.' See Hollingsworth v. Duane, Wall, Sr. 77, Fed. Cas. No. 6,616; Re Stewart, 118 La. 827, 43 So. 455; Re Clark, 208 Mo. 121, 15 L.R.A. (N.S.) 389, 106 S.W. 990."

"In one of the great opinions delivered by Mr. Justice White, the court announced: 'The fundamental conception of a court of justice is condemnation only after hearing. . . . A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.' Hovey v. Elliott, 167 U.S. 414, 42 L. Ed. 220, 17 Sup. Ct. Rep. 843."

Finally, in the case at bar, there was an adjudication that petitioners were guilty of contempt of court (R. 311) for failure to transfer the stock to Streit on the books of the company, in "compliance" with an order that had not been entered. They sought to have this adjudication quashed on petition for certiorari (R. 309), but the Florida Supreme Court denied (R. 328) the petition.

In connection with the contempt threats, it should be remembered that petitioners owned, jointly, only 136,399 shares of the stock, as the record discloses, whereas a controlling interest in the company would have required approximately 400,000 shares. Equity jurisdiction had been invoked, and could have been invoked, only on the basis of there being ground for specific performance by reason of the matter of control being involved. Otherwise, an action at law for damages would have been the only remedy. Accordingly, if the court had permitted petitioners to establish that they could rightfully produce, and could lawfully be required to produce, only 136,399 shares of the stock, the equity jurisdiction of the court, for specific performance, would have been lost. Accordingly, in order to preserve its jurisdiction, the Circuit Court denied petitioners any right to be heard, and so framed the final decree as to subject petitioners to jail commitment if they failed to acquire, or produce the securities. That action and the Court's subsequent action was violative of the due process and equal protection clauses.

The position in which petitioners were placed, with respect to the threats and adjudication of contempt against them, to compel them to surrender possession of the "third party" owned securities, was not unlike that of the plaintiff in Refoule vs. Ellis, 74 F. Supp. 336, 339, as to which it was said:

> "Complaint is made, here, of arbitrary action by defendants under color of law in depriving him of liberty without due process of law by the exercise of personal restraint over him and confinement without a warrant, and resort to unlawful means in an effort to coerce a confession from plaintiff. While reasonable questioning of a suspect while in the custody of police officers is not prohibited either as a matter of common law or due process (Lyons v. Oklahoma, 322 U.S. 596, 601, 64 S. Ct. 1208, 88 L. Ed. 1481, 'the due process clause forbids compulsion to testify by fear of hurt, tor-

ture or exhaustion' (Adamson v. California, 67 S. Ct. 1672, 1677), and 'so-called third degree methods have no place in our civilization.' Perrygo v. United States, 55 App. D.C. 80, 2 F. 2d 181, 184. Strikingly similar violations of civil rights were considered and discussed by this Court in United States v. Sutherland, 37 F. Supp. 344, and the Supreme Court has spoken too often and too emphatically upon this subject for it to be now held that denials of due process do not appear from plaintiff's petition. See Brown v. Mississippi, 297 U.S. 278, 56 S. Ct. 461, 80 L. Ed. 682; Chambers v. Florida, 309 U.S. 227, 60 S. Ct. 472, 84 L. Ed. 716; White v. Texas, 310 U.S. 530, 60 S. Ct. 1032, 84 L. Ed. 1342; Lisenba v. California, 314 U. S. 219, 62 S. Ct. 280, 86 L. Ed. 166; Ashcraft v. Tennessee, 322 U.S. 143, 64 S. Ct. 921, 88 L. Ed. 1192; Id., 327 U.S. 274, 66 S. Ct. 544, 90 L. Ed. 667; Malinski v. New York, 324 U.S. 401, 65 S. Ct. 181, 89 L. Ed. 1029; Mooney v. Holohan, 294 U.S. 103, 55 S. Ct. 340, 79 L. Ed. 791, 98 A.L.R. 406; Ex parte Virginia, 100 U.S. 339, 25 L. Ed. 676; Home Telephone Company v. Los Angeles, 227 U.S. 278, 33 S. Ct. 312, 57 L. Ed. 510; Hague v. C.I.O., 307 U.S. 496, 59 S. Ct. 954, 83 L. Ed. 1423."

The civil rights of petitioners were violated. They were compelled to deliver the securities into the registry of the Court (but not to respondents), and title manifestly did not pass.

And yet J. Bradley Streit, (or his alter ego, McDonald & Co., Stock Brokers, Cleveland, Ohio) is in possession of the securities, negotiable in form, as a result of a series of proceedings wherein settled rules of law, and established usage and modes of procedure have been discarded and violated, in an arbitrary exercise of power. Where, and in what manner is redress to be obtained, but in the Supreme Court of the United States?

The Circuit Judge, at the time of the enforcement of the decree for specific performance (R. 252) was fully and in every conceivable manner informed as to

the actual, bona-fide ownership of the securities (R. 297, 298, 299), but notwithstanding such full and complete knowledge, proceeded as we have shown, under threat of jail commitment for contempt (and finally with an adjudication thereof), to "judicially" take the securities from the non-litigating owners, for the benefit of J. Bradley Streit, respondent. Rights were violated that can not be said to be less valuable than the right to free speech, which this Court has guarded with a jealous eye. We refer to American Federation of Labor vs. Swing, 312 U.S. 321, 61 S. Ct. 568, 85 L. Ed. 855, rehearing denied 312 U. S. 715, 61 S. Ct. 735, 85 L. Ed. 1145, supra, reversing 372 Ill. 91, 22 N. E. 2d 857:

> "Since the case clearly presents a substantial claim of the right to free discussion and since, as we have frequently indicated, that right is to be guarded with a jealous eye, Herndon 1066, 1075, 57 S. Ct. 732; Schneider v. Irvington, 308 US 147, 161, 84 L. Ed. 155, 164, 60 S. Ct. 146; United States v. Carolina Products Co. 304 US 144, 152, note, 82 L. Ed. 1234, 1241, 58 S. Ct. 778, it would be improper to dispose of the case otherwise than on the face of the decree, which is the judgment now under review." * * * *
>
> "Such a ban of free communication is inconsistent with the guaranty of freedom of speech. That a state has ample power to regulate the local problems thrown up by modern industry and to preserve the peace is axiomatic. But not even these essential powers are unfettered by the requirements of the Bill of Rights. The *scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute, whatever those limits, be defined by statute or by the judicial organ of the state."

In the case at bar, we have shown that the State Court achieved a constitutionally prohibited end through processes that were violative of the due process clause,

and that the threats of contempt commitments played a prominent part therein.

CONCLUSION

When a State Supreme Court denies a litigant the right to contract and substantive due process; the right to be heard and procedural due process; and acts upon important litigation in arbitrary and capricious disregard of undisputed facts, it pursues a course that strikes at the very foundation of a civilized order.

What a court may do in one case, it may do in many cases, or in all cases, and all who are concerned with a civilized order, are concerned with the rights guaranteed to the individual by the Federal Constitution. It cannot be correctly said that a denial of due process or equal protection is a concern of the individual litigant, alone, and that his plight is irremediable because of the narrowness of his own corner. The importance of the questions here presented, and their substance, should require the Court to take jurisdiction.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Claude Pepper,
Cafritz Building,
Washington, D. C.

W. G. Ward,
Du Pont Building,
Miami 32, Florida.

T. J. Blackwell,
First Federal Building,
Miami 32, Florida.

Attorneys for Petitioners.

Supreme Court, U.S.
FILED
APR 14 1952
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 661.

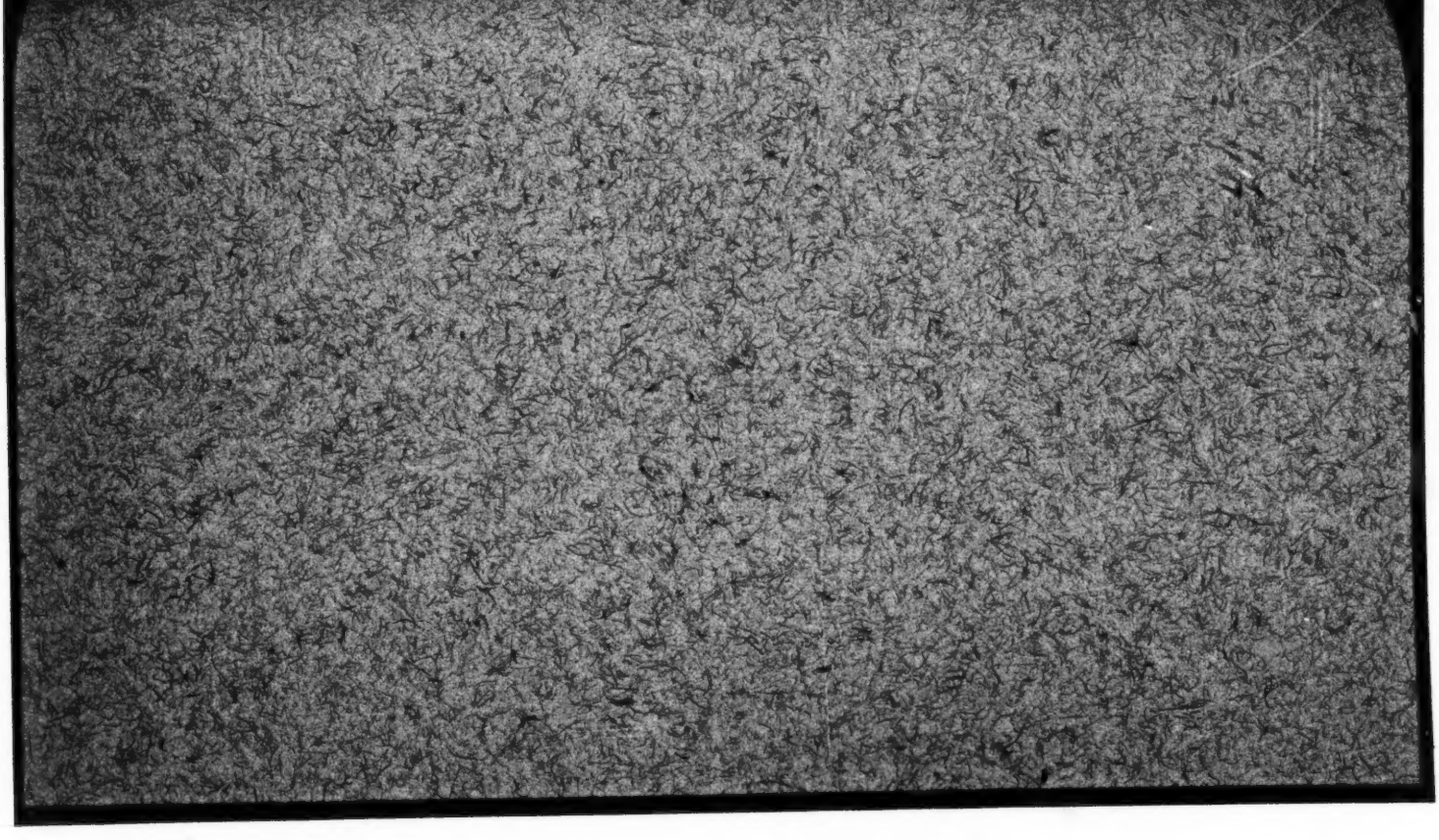
C. B. KING, JOHN H. GERKEN AND M. F. PATTORD,
PETITIONERS,

VS.

J. BRADLEY STREET AND A. W. WALLACE,
RESPONDENTS.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI.

Robert H. Anderson,
Miami, Florida,
Attorney for Respondents.



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J. BRADLEY STREIT AND A. W. WALLACE,
RESPONDENTS.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI.

HISTORY OF THE CASE.

This is a simple suit for the specific performance of a contract to sell stock in a corporation. It involves about $2,000,000. Otherwise it has no unusual features. It contains no intricate propositions of law or complicated questions of fact. It involves no constitutional or other federal questions.

The First Contract.

On February 8, 1950, the petitioners jointly signed the following letter addressed to the respondent, J. Bradley Streit:

> "We acknowledge receipt of your check in the amount of $10,000.00 to apply on the purchase of approximately 440,000 shares of the capital stock of Maule Industries, Inc. at a net price of $2.75 per share and first mortgage bonds of Maule Industries, Inc. in an amount to be determined within fifteen days at a price of par plus interest to date of transfer.[1]
>
> "It is understood and agreed that you will deposit with the Miami Beach First National Bank, Miami Beach, Florida, sufficient funds to pay for the above listed securities on or before March 10th, 1950, at which time the transaction is to be closed, and you are to have the right to elect a majority of the board of directors.
>
> "In the event you fail to make payment for the above securities on the above date, the $10,000.00 deposit mentioned in your letter is to be forfeited as liquidated damages." (Plaintiffs' Exhibit No. 1, R. 126.)

The Second Contract.

On March 9, 1950, they addressed the following letter to A. W. Wallace and J. Bradley Streit, the respondents:

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[1]The exact number of bonds was set forth in a separate letter (Plaintiffs' Exhibit No. 3, R. 127).

All record references are to the printed transcript. In every case emphasis is supplied unless otherwise noted.

"We agree to sell to you on or before July 1, 1950 approximately three Hundred thousand (300,000) shares of Maule Industries Inc stock at a price of $2.75 per share payable in cash at time of closing.

"This agreement to sell to you the aforesaid stock is made with the understanding that the stock will be voted by a voting trust—the terms of which shall be along the lines discussed at tonight's conference and shall be mutually agreeable to you and ourselves. The voting trust shall be formally entered into simultaneously with our sale of said stock.

"The consideration for this agreement is the cancellation of agreement dated Feb. 8, 1950 by J. Bradley Streit—which agreement has been cancelled by separate instrument." (Plaintiffs' Exhibit No. 4, R. 128.)

The Release.

The "separate instrument" which is referred to in petitioners' and in respondents' brief as the "release" was executed simultaneously with the second contract and appears in the record as "receipt of March 9th, 1950 signed by J. Bradley Streit" (R. 166).

The Proceedings Below.

On June 23, 1950, the respondents filed a bill of complaint (R. 12-15) in the Circuit Court of Dade County, Florida against the petitioners alleging the making of these agreements, that Streit was ready, willing and able to perform the first one and so informed petitioners prior to its expiration date, and that petitioners sought a modification of it and made the second agreement. The bill

further alleged that the respondents desired to perform this agreement within the time specified and to avail themselves of its benefits, that they sought to induce the petitioners to perform it, had prepared and tendered a form of voting trust agreement, the terms of which were in accordance with the conference between the parties, spent considerable time and money arranging to finance it, and at all times had been ready, able and willing to perform and so advised the petitioners, but the latter wholly failed and refused to carry it out and repudiated it. Respondents averred that they were willing to carry out either contract, that the former had a peculiar value because it gave control of the corporation, and the latter had a peculiar value because the respondents hold or control additional stock which would enable them to control it.

The petitioners moved to dismiss the bill. The Court overruled these motions and required them to answer (R. 20, 29). After answering (R. 20-23), they filed a motion for summary decree, which was denied (R. 29).

The Florida Supreme Court denied certiorari (R. 30) (51 So. 2d 196).

On final hearing before the Chancellor the bill was dismissed (R. 199) for the reasons given by him in his opinion (R. 195-199).

The respondents appealed (R. 199-200). The Florida Supreme Court reversed (R. 202-205) (54 So. 2d 522). A petition for rehearing was denied (R. 222-223). Thereupon the Chancellor vacated his former decree and entered a final decree "in accordance with the mandate of the Supreme Court of Florida" whereby the petitioners

were required to deliver to the respondent Streit the 440,000 shares of the common stock of Maule Industries, Inc. and the whole issue of its first mortgage bonds[2] endorsed so as to vest title to the stock and bonds in Streit free and clear of all liens and encumbrances, whereupon Streit was required to pay for the stock and the bonds (R. 252-253). The petitioners took an appeal from this decree (R. 253-254), but the Court quashed the appeal "as the questions raised in said appeal were decided in the former appeal of this cause" (R. 273). At the same time the Florida Court denied an application for supersedeas which petitioners sought in an effort to obtain a review by this Court (R. 281). One of the Justices of this Court refused a like application. After the Florida Supreme Court quashed the petitioners' appeal from the Chancellor's decree that was entered upon its mandate, the petitioners *complied with the decree* by producing 431,442 shares of the common stock of Maule Industries, Inc. and $591,600. of its first mortgage bonds, which the respondents accepted and delivered to the Court a cashier's check of The First National Bank of Miami payable to the petitioners in the sum of $1,789,282.94. The Court made an order directing delivery of the bonds and certificates for the shares of stock so produced to Streit and decreed that upon the payment of costs "the defendants, C. B. King, John H. Gerken and M. F. Pafford, will have complied with the Final Decree of November 15, 1951" (R. 302-303). The petitioners applied to the Florida Supreme Court for

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[2]Under the decree petitioners were permitted to retain $150,000. in accordance with their contract, but they did not elect to do so.

certiorari to review this order, but their petition was denied (R. 307).[3]

Although the petitioners had delivered to the respondents the stock and bonds that were the subject matter of the contract of sale, they, as officers of the corporation, refused to transfer the stock on the company's books. Upon the respondents' application (R. 314-318) the Court issued a rule to the petitioners directing them to forthwith transfer upon the company's books the 431,442 shares of common stock of Maule Industries to J. Bradley Streit and to issue to him and in his name new certificates therefor and deliver them to him immediately or show cause on a day fixed why they fail and refuse to do so (R. 321). The petitioners filed a return to this rule that set forth numerous and specious reasons for their refusal to transfer the stock (R. 322-323), which the Court held was insufficient and announced that he would adjudge the petitioners to be in contempt but gave them the privilege of purging themselves on immediate compliance with the decree (R. 326). "Compliance," said the Court, "means doing everything that is necessary to effect a transfer of the shares of stock involved to the plaintiff Streit so that he may have and enjoy full ownership and all the rights incident to such ownership, including the transfer on the books of the corporation of the stock to him." The petitioners applied to the Florida Supreme Court for a writ of certiorari to review this order, but their petition was denied (R. 328).

---

[3]On December 21, 1951, the petitioners renewed their application to one of the Justices of this Court for a stay order. It was again refused.

Invoking jurisdiction under Title 28, Section 2157(3), United States Code, because of the alleged denial by the Supreme Court of Florida of rights claimed by them under the Constitution of the United States, the petitioners have applied for a writ of certiorari to review nine orders of the Florida courts.

ARGUMENT.

I. There Is No Federal Question Involved in This Case.

There is no Federal question in this case. The petitioners have had a full and complete hearing of their case in conformity with standards of the due process clause. They have been accorded the same treatment that other litigants in Florida courts have received. There has been no denial of the equal protection of the laws.

Rule 38 of this Court indicates the character of reasons which will be considered by it in granting a review on writ of certiorari where there are special and important reasons therefor. The applicable subsection of this rule is

> "(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

In spite of their vigorous effort to manufacture a federal question the petitioners have wholly failed to bring their case within the rule.

The basic question in this case is one of state contract law. The respondents sued the petitioners to compel the specific performance of a contract that petitioners admittedly made for the sale of corporate stock. Petitioners contend that rights guaranteed by the Federal Constitution were invaded in these proceedings. They also contend

these rights were violated by a decree requiring them to deliver the stock to the purchasers upon payment of the agreed price because the Court had power under general principles of equity jurisprudence to punish violations of its decree by contempt proceedings, although no such proceedings were commenced as they voluntarily complied with the decree by delivering the stock.

The Chancellor, after an analysis of the facts and documents presented at the trial held that the respondent, Streit, relinquished his rights under the first contract in consideration of the second contract and that the first contract should be enforced if the second contract was void for lack of consideration (R. 197-198). The Chancellor held that a conditional promise was good consideration and that therefore the second contract was not void for lack of consideration. The Chancellor concluded that Streit, in relinquishing his rights under the first contract, acted in consideration of a conditional promise and that this conditional promise was all he was entitled to receive. Under the rule of law adopted by the Chancellor the performance of the second contract by the petitioners was excused when this condition was not satisfied.

The Supreme Court of Florida specifically rejected the theory of law adopted by the Chancellor and the authorities relied on by him. The Court held that the conditional promise was the very pith of the second contract and that, with the failure of the petitioners to take action to bring about this condition, the consideration for the second contract failed. This being the case, the Florida Supreme Court held that the first contract was "still in effect and

subject to enforcement" * * * (R. 205). Upon remand, the Chancellor entered a decree enforcing the first contract.

This summarizes the main steps in the case. Petitioners filed countless motions and appeals at every step in the proceedings. Most of their arguments of arbitrary action by the state courts of Florida are based on rulings in connection with motions or appeals that either were without merit or premature or were attempts to re-argue points which had previously been ruled upon. Petitioners have had a full and complete opportunity to present their case to the Florida courts and those courts have held that the respondents are entitled to enforcement of the first contract on the basis of the facts and state law.

No case can be cited to sustain the existence of a federal question in this set of facts. In one of the cases cited by petitioners this Court said that the fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the rights for which the constitutional protection is invoked. *Anderson National Bank* v. *Luckett,* (1944) 321 U. S. 233.

Surely the petitioners cannot complain of the opportunity afforded them to be heard in this case. At the initial hearing they were given a full opportunity to present their case and all of their evidence to the Chancellor *who decided in their favor* (R. 199). Petitioners had a complete hearing of their contentions before the Florida Supreme Court, including consideration of oral argument, briefs, and a petition for rehearing. Further hearings were had before the Chancellor upon entry of the decree (R. 244)

and before the Supreme Court of Florida upon the appeal from this decree (R. 273).

In another case cited by the petitioners it is held that the intepretation by the courts of a state of written and unwritten laws of the state is not reviewable by the Supreme Court of the United States, and the mere fact that a state court has rendered an erroneous decision on questions of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the 14th Amendment or otherwise confer appellate jurisdiction on the Supreme Court of the United States. *Brinkerhoff-Faris Trust & Savings Company* v. *Hill,* (1930) 281 U. S. 673. To confer jurisdiction on the federal courts, the federal question must be real and substantial and not colorable or frivolous, and must really appear and not be by mere inference or suggestion (*Hanford* v. *Davies,* (1896) 163 U. S. 273; *Western Union Telegraph Co.* v. *Ann Arbor R. Co.,* (1900) 178 U. S. 239), and must be an essential or integral part of the case (*Tennessee* v. *Union & Planters' Bank,* (1894) 152 U. S. 454; *Shulthis* v. *McDougal,* (1912) 225 U. S. 561).

Mere references to the Federal Constitution, laws or treaties and mere assertions that a federal question is involved are insufficient to confer jurisdiction. *Starin* v. *New York,* (1885) 115 U. S. 248; *O'Callaghan* v. *O'Brien,* (1905) 199 U. S. 89; *Lambert Run Coal Co.* v. *Baltimore & Ohio R. Co.,* (1922) 258 U. S. 377. In an exhaustive review of the subject and the adjudicated cases this Court held, in *Eilenbecker* v. *District Court of Plymouth County, Iowa,* (1890) 134 U. S. 31, that the right of a court to punish a

party by summary proceeding and without trial by jury did not violate the due process clause of the 14th Amendment.

With these principles in mind, a careful examination of petitioners' various claims demonstrates clearly that no federal question is involved in this case. As the Court said in *O'Callaghan* v. *O'Brien, supra,* rights asserted under the Constitution of the United States may be so wholly wanting in merit as not to afford the basis of the exercise by it of its appellate jurisdiction.

There was never any claim made by the petitioners that any federal question was involved until the case had been completed before the Chancellor, briefed and argued on appeal, and decided against them. Then in the course of a petition for rehearing they said that the enforcement of a contract "which the parties had never entered into"[4] violated their property rights in contravention of the 14th Amendment because the parties had executed a release of the contract. The Florida Supreme Court merely held that the consideration for releasing the first contract was the making of the second one, and when the petitioners refused to perform the second contract the consideration for the release of the first one failed. Even assuming that this point was raised at the first opportunity, it is impossible to see how any federal question could arise out of these facts and this holding.

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[4]Their answer admitted that they made the contract but claimed they had been released from it (R. 21). Erroneous factual statements made in the petition in connection with this claim are discussed in detail in Paragraph 2 of the appendix.

Repeatedly throughout the petition it is said that the decree requiring the petitioners specifically to perform their contract to sell and deliver the stocks and bonds of Maule, Industries, Inc. was made under threat of commitment for contempt upon their failure to do so. This is wholly untrue and there is no support in the record for it. At no time did the Court ever threaten to commit the petitioners for contempt. They are unable to point out anything in the record to that effect, except their own uncorroborated statement in a motion for certification of the proceedings (R. 304) that the Court denied (R. 305), which meant that it was not correct.

After the stock and bonds had been delivered by the petitioners to the respondents pursuant to the decree, request was made to transfer the stock on the books of the company, which was refused upon instructions of petitioner King who was president of the company. It was necessary for the respondents to apply to the Court for assistance to protect its decree. The Court issued a rule to the petitioners requiring them to have the stock transferred to respondents or "show cause why they failed to do so." The Chancellor found the petitioners' response to this rule insufficient and said that they were in contempt of court. He added, "I will give them the privilege of purging themselves of contempt on immediate compliance with such decree" (R. 326). They purged themselves by having the stock transferred to the respondent Streit and registered in his name.

The record is devoid of any other reference to citing the petitioners for contempt or committing them, although

equity courts from time immemorial have exercised the power of enforcing their decrees by contempt proceedings. *Eilenbecker* v. *District Court, supra.*

In the case of *State* v. *Thomas,* (1906) 74 Kan. 360, 86 P. 499, the defendant was convicted of contempt by violating a temporary injunction, and on appeal his conviction was affirmed by the Supreme Court of Kansas. A writ of error from the Supreme Court of the United States was dismissed for want of jurisdiction. *Thomas* v. *Kansas,* (1907) 205 U. S. 536.

Petitioners' argument would make a Federal constitutional question out of every court decree for specific performance and out of every court order by which a court directs an individual to conform to its rulings. This is absurd. This Court has always recognized the power of courts to enforce their decrees. See *Wise* v. *Mills,* (1911) 220 U. S. 549, and *Wise* v. *Henkel,* (1911) 220 U. S. 556.

Petitioners make much of the fact that they did not personally own all the shares they contracted to sell. In this connection, it is complained that the Chancellor at the original hearing before him restricted the hearing so as to exclude the issue of petitioners' ownership of the stock although this defense was "duly pleaded and repeatedly urged." This is not correct. The answer of defendants (R. 20-23) at no place avers that petitioners were not the owners of the stock and bonds and could not acquire them. The transcript of the proceedings before the Chancellor (R. 35-195) is destitute of any suggestion that the hearing was in any way restricted.

Petitioners also say that the decision in this case purports to bind persons who are not parties. This is not

correct. The decree requires the petitioners to produce only the stock which they had contracted to produce. The decree requires nothing of any other person. Petitioners are incorrect in stating that it does purport to do so. Whether or not petitioners themselves owned a sufficient amount of stock is immaterial to this Court. So is the question of their authority to act for other owners of the stock.

If the petitioners had wished to raise the point that they did not own the stock that they agreed to sell, they should have done so in their answer. After that they waived it.[5] When the decree was entered requiring them to produce the stock and bonds in court, they should have told the Court they did not have them and could not get them. This, of course, could have been proved to be false. Instead they went out and got the stock and bonds and delivered them, and the respondents accepted them and paid for them. That, it seems to us, is the end of the chapter.

"We may summarily dispose of the defense of impossibility of performance. It is a matter of state law * * *" *Regents of Georgia* v. *Carroll*, (1950) 338 U. S. 586, 594.[6]

Petitioners also say that they were deprived of property without due process of law because of the rulings of

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[5]Florida Equity Rule 33(h) provides: "A party shall be deemed to have waived all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply . . ." This is substantially identical with Federal Rule 12(h).

[6]This case also involved a stock purchase contract.

the trial court and the state Supreme Court on various motions and appeals. Petitioners claim that they were denied a hearing on certain defenses. The record shows that all defenses raised by the petitioners were considered. Petitioners have simply misinterpreted the record. In some cases the defenses were clearly frivolous; in other cases they had been previously ruled upon. The Florida courts held that these defenses now asserted by the petitioners were insufficient as a matter of law on the basis of facts found by the court. Due process of law does not require a court to discuss or write an opinion on each and every ruling and decision which it renders.

Petitioners also argue that they were denied the equal protection of the laws on the ground that they were not given the same rights of appeal in their case as those granted other litigants in Florida courts in Chancery cases. This claim, likewise, is wholly without foundation. Petitioners did have a complete hearing on their appeal to the Supreme Court of Florida in accordance with Florida procedure. *After* the opinion of the Supreme Court of Florida had been rendered and pursuant to that court's mandate, the trial court entered a decree granting enforcement of the first contract in accordance with the following statement in the opinion of the Florida Supreme Court:

> "Since this is the case the first contract is still in effect and subject to enforcement. * * *" (R. 205).

Petitioners urge that the Florida Supreme Court quashed their appeal from this decree that was entered

pursuant to its mandate without giving them a hearing. This is not so. After hearing argument from counsel for both parties, the Florida Supreme Court quashed the appeal on the grounds that "* * * the questions raised in said appeal were decided in the former appeal of this cause" (R. 273 and R. 289).[7] The Court knew that the petitioners were trifling with it and refused to permit them to do so. In these circumstances petitioners have been accorded the same rights of appeal accorded to all other litigants in the Florida courts who are similarly situated.

II. The Petition for Certiorari Was Not Timely Filed.

A writ of certiorari intended to bring a judgment in a civil action before the Supreme Court for review must be applied for within ninety days after the entry of such judgment (Title 28, Section 2101(c), United States Code). This provision is applicable to appeals from state courts (Section 2104).

June 23, 1950 — Respondents filed a bill in the Circuit Court of Dade County, Florida, to compel the specific performance of a contract made by them with the petitioners for the sale of the controlling interest of the capital stock and bonds in a closely held corporation (R. 12-15).

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[7]Section 59.33, Florida Statutes, 1951, cited by the Florida Supreme Court in its order reads as follows:

"Appellate courts shall have power to quash appeals in all cases in which appeals do not lie, or where they are taken against good faith or merely for delay, and may decree in such case damages against the appellant not exceeding ten per cent."

January 8, 1951	The Florida Supreme Court denied petitioners a writ of certiorari to review the order of the Chancellor refusing to dismiss the bill or to enter a summary decree in their favor (*King* v. *Streit*, (1950) 51 So. 2d 196) (R. 30).
April 2, 1951	The Chancellor, after hearing the evidence of the parties, found for the petitioners and dismissed the respondents' bill of complaint (R. 195-199).
August 24, 1951	The Supreme Court of Florida reversed the Chancellor's decree in petitioners' favor (54 So. 2d 522) (R. 202-205).
November 6, 1951	The Supreme Court of Florida denied a rehearing and issued its mandate (R. 222-223).
November 15, 1951	The Chancellor, "in accordance with the mandate of the Supreme Court of Florida," vacated the decree entered by him in favor of the petitioners and entered one in favor of the respondents directing the specific performance of the contract by the petitioners (R. 252-253).
November 27, 1951	The Supreme Court of Florida quashed an appeal taken by the petitioners from the final decree entered by the Chancellor pursuant to its mandate, "as the questions raised in said appeal were decided in the former appeal of this cause" (R. 273).

It is apparent from the opinion (R. 202) of the Supreme Court of Florida (on which a rehearing was denied on November 6, 1951) that the Appellate Court at that time had in fact fully adjudicated all rights of the parties and that the adjudication was not subject to further review by a state court. This left only a ministerial act for the Chancellor to perform. This is confirmed by the action of the Florida Supreme Court in quashing the appeal from the decree because all the questions raised "were decided in the former appeal."

In these circumstances, the judgment of the Florida courts became final on November 15, 1951, when the Chancellor entered his decree in conformity with the mandate of the Supreme Court of Florida. The time for applying for certiorari to the Supreme Court of the United States therefore began to run on that date.

Department of Banking v. *Pink*, (1942) 317 U. S. 264, rehearing denied 318 U. S. 802.

Cole v. *Violette*, (1943) 319 U. S. 581, rehearing denied 320 U. S. 810.[8]

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[8]Strictly speaking, under the cases cited, the time for applying for certiorari began to run from November 6, 1951, when the Supreme Court of Florida denied a rehearing and issued its mandate. However, this mandate required further action by the court below, as the Florida Supreme Court gave the respondents the option to enforce either the first or the second contract. They elected to enforce the first (R. 244). This then required the entry of a further order by the Chancellor, which was entered on November 15th. That it is clear that this was perfunctory only after the option had been exercised is borne out by the language used by the Florida Supreme Court in quashing the appeal from the decree entered by the Chancellor pursuant to the mandate.

The facts summarized above clearly indicate that the petition here is not timely under the test set forth in the cited cases. Petitioners' actions in this litigation subsequent to November 27, 1951 demonstrate the appropriateness and necessity of applying the rule of the cited cases to this case. For, after that date, petitioners filed numerous other petitions in the Supreme Court of Florida (See R. 274, R. 281, R. 307, and R. 309). Having exhausted their state remedies, petitioners decided to exhaust the state court. Petitioners should not be able to extend the time in which they must file in this court by continuing to file a varied assortment of documents in the state court. Petitioners' rights having been adjudicated, they should have filed their petition (or secured an extension of time for its filing) within ninety days of November 15, 1951.

On February 13, 1952, the ninety-day time limit for applying for a writ of certiorari expired.[9]

The petition for certiorari was filed March 19, 1952. It was more than a month too late.

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[9]The petitioners procured an *ex parte* order from one of the Justices of this Court on March 17th extending the time for filing a petition for certiorari until April 10th. However, as the time had expired when the application for the extension was made, the order granting the extension was ineffective to confer jurisdiction. *Robertson & Kirkham Jurisdiction* of the Supreme Court of the United States (2nd Edition, 1951) Section 415, page 828 *et seq.*; *Finn* v. *Railroad Commission of California*, (1932) 286 U. S. 559; *Cresswell* v. *Tillinghast*, (1932) 286 U. S. 560; *Cherami* v. *Cantrelle*, (1932) 287 U. S. 568.

Where an extension had been obtained wherein counsel unknowingly cited erroneous judgment date and the time had actually expired prior to presentation of the application, the extension was ineffective. *Carleton Screw Products Co.* v. *Fleming*, (1942) 317 U. S. 634.

CONCLUSION.

The petition contains many inaccuracies and makes use of "straw men" in a desperate attempt to fashion a Federal question. The most flagrant of these errors are discussed in the Appendix. The respondents of course recognize that court action is state action, but this principle does not of itself transform a question of state law into a Federal constitutional question unless there is some deprivation of a Federal constitutional right. There was none here. The petitioners made a contract and tried to get out of it. The state courts, after careful analysis of all the facts, held that this contract was still subject to enforcement. Petitioners have had a full and complete hearing and their case presents no problem meriting the attention of this Court.

Moreover, petitioners have not complied with jurisdictional requirements as to the time in which the petition must be filed under the tests set forth in the opinions of this Court.

It is respectfully submitted that the petition for certiorari should be denied.

ROBERT H. ANDERSON,
Miami, Florida,
Attorney for Respondents.

APPENDIX.

Factual Statements in the Petition for Writ of Certiorari Not Supported by the Record.

1. It is complained that the bill of complaint did not allege that the defendants owned the stock when they made the contract. The general rule is that the bill of complaint need not allege defendant's ability to perform (58 C. J. 1167). His inability to perform is a matter of defense which must be pleaded and proved (58 C. J. 1175). *The defendants in the court below did not raise the point.* The motions to dismiss the bill (R. 16-20) will be searched in vain for any ground based on the failure to allege ownership of the stock by the defendants. Their petition for certiorari to the Florida Supreme Court to review the order denying the motion to dismiss nowhere complains of the absence of any such allegation in the bill (R. 1-11).

Not only that, but the petitioners' counsel stated in open court to the Chancellor as late as the entry of the second final decree:

> "Counsel knows that 440,000 shares of stock are not owned by these defendants in their own names. They know that for (*sic*) the record. That stock has to be assembled, produced. *We are not raising that as an issue, understand, as a defense to your Honor's decree,* but there are things which we have to do in the assembly of this stock, and we think there is an honest desire on the part of our clients to have the Supreme Court of Florida review the decree your Honor entered." (R. 263)

In their brief in support of their petition to the Florida Supreme Court for certiorari it is said:

> "The business, Maule Industries, was founded in 1914 by the late Evert P. Maule. It was initially operated as Maule-Ojus Rock Company, and later, for a number of years, as a partnership composed of Evert P. Maule and Kathryn C. Maule, his wife. However, a few years ago, following Mr. Maule's death, the business was incorporated under the name of Maule Industries, Inc. Upon such incorporation, members of the Maule family, including Mrs. Maule and the husbands of her daughters became the principal stockholders. Mrs. Maule was, and is, Chairman of the Board of Directors. Her son-in-law, C. B. King, petitioner, became and is President of the company, and John H. Gerken, petitioner, also a son-in-law, became and is Treasurer thereof.
>
> * * *
>
> "On that basis, and without advice of counsel, the parties entered into a tentative and informal agreement under which Mr. Streit agreed to buy *from the members of the Maule family* approximately Four Hundred Forty Thousand (440,000) shares of the capital stock of Maule Industries, Inc., and approximately $1,000,000.00 worth of the company's mortgage bonds; at least, Mr. Streit made a 'binder' deposit in that behalf, in the sum of Ten Thousand Dollars ($10,000.00)."

This statement was repeated twice in briefs at later stages of the proceedings.

The truth of the matter is that the owners of the 440,000 shares of stock and the bonds (except the petitioner Pafford) were members of the Maule family. (R.

80-81, 89, 96, 99, 100) King and Gerken, the sons-in-law, were acting for their wives and their mother-in-law as their duly authorized agents. The mother-in-law, the wives, and everybody else knew all about the agreement and had approved it. That is why no such defense was raised; it could not have been sustained. Counsel in this case know that. One member of counsel was a director of the Maule company and a stockholder. This is a sheer afterthought—a grasping at straws.

When the Chancellor, upon the mandate of the Supreme Court of Florida, directed the petitioners to deliver the stock and bonds to the respondents, they went out and collected from the other members of the family group (except from one who had died) the certificates covering the shares of stock and the bonds that originally were contracted to be sold. (R. 80-81, 89, 96, 99, 100) They brought them into court and delivered them to the respondents who paid for them and accepted them. The stock has been transferred on the books of the company to Streit and he has endorsed the stock and delivered it and the bonds to McDonald & Company, of Cleveland, Ohio, who put up the money to pay for them. Under the provisions of the Uniform Stock Transfer Act, which is in effect in Florida, (Chapter 614, Florida Statutes 1951) McDonald & Company acquired a good title.

2. In several places in the petition the statement is made that the bill of complaint failed to allege that the respondents had released the petitioners from the first contract which was ultimately enforced with the insinuation that the respondents were attempting to suppress some material fact. It would be a complete answer to say that

this was a matter of defense, but as a matter of fact the bill set forth *in haec verba* both contracts. The second one contained this language:

> "The consideration for this agreement is the cancellation of agreement dated Feb. 8, 1950 by J. Bradley Streit—which agreement *has been cancelled by separate instrument.*" (R. 14)

It has always been the respondents' contention, which was sustained by the Florida Supreme Court, that the refusal of the petitioners to perform the second contract worked a failure of consideration for the cancellation of the first one and consequently a failure of consideration of the release that was given (R. 205).

Petitioners continually argue that the courts below ignored the release which was signed simultaneously with the execution of the second contract. Petitioners contend that no consideration was given to their rights under this release. This contention is frivolous. The release was only one of the documents which had to be considered by the courts in arriving at a determination of the rights of the parties in this transaction. It was specifically considered along with all the other documents and facts. The Chancellor concluded—on the basis of *all the facts* in connection with the execution of the release and the second contract—that the relinquishment of Streit's rights under the first contract was in consideration of the second contract. "The real consideration, however, for Streit's relinquishment of such rights [under the first contract] was the execution on March 9, 1950 (simultaneously with the execution of the release) of a new written agreement . . ." (R. 196).

This finding was accepted by the Florida Supreme Court: "There can be no doubt that these provisions of the second contract were the considerations for releasing defendants from their obligation under the first contract. * * *" (R. 203-204) The determination by the state Supreme Court that the first contract was enforceable since the consideration for the second contract failed does not ignore the release, but is based on the conclusion that the release was executed in consideration of the second contract and should be given no independent force. No Federal question is presented by a state court's determination of the interpretation and effect to be given to a series of related documents. To separate one document from all the other facts and documents in the transaction, as petitioners do, is wholly misleading. The state courts here did not ignore the release as petitioners claim, but considered it along with all the other pertinent facts. Whether or not the first contract was still in effect and enforceable in view of the release and the conditional promise in the second contract was a question of local law. The decision of the state Supreme Court on Florida law on this contract problem is final.

3. It is said that the decree of specific performance made by the Chancellor on November 15, 1951, pursuant to the mandate of the Supreme Court was entered without hearing. This is wholly untrue. Immediately preceding this decree in the transcript under the caption, "Minutes of Proceedings Before Honorable Vincent C. Giblin Regarding Hearing on November 15, 1951," there appears a full record of the hearing (R. 244-252).

4. The petitioners' repudiation of their contracts was attempted to be justified upon the ground that Streit when

he made the first one agreed that the former owners of the property should continue in its management and control. Even if there were evidence of such it would be inadmissible, but the contract itself negatives the thought. It expressly provides:

> "* * * you are to have the right to elect a majority of the board of directors." (Plaintiffs' Exhibit No. 1, R. 126).

5. The bill of complaint, it is said, was brought for the specific performance of a "short sale" because the sellers did not own the property contracted to be sold. This is untrue for the reasons pointed out under number 1. No question of a short sale or the legality thereof was ever raised at any stage of the proceedings in this case either before the Chancellor or the Florida Supreme Court.

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Supreme Court of the United States

OCTOBER TERM, 1951

No. 661

C. B. KING, JOHN H. GERKEN and M. F. PAFFORD,
Petitioners,

v.

J. BRADLEY STREIT and A. W. WALLACE, *Respondents.*

PETITIONERS' REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI.

CLAUDE PEPPER,
Cafritz Building,
Washington 6, D. C.

W. G. WARD,
Dupont Building,
Miami 32, Florida.

T. J. BLACKWELL,
First Federal Building,
Miami 32, Florida.

Attorneys for Petitioners.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PRELIMINARY STATEMENT.

Respondents open their brief by asserting that this is a simple suit for the specific performance of a contract, which contains no intricate propositions of law or complicated questions of fact. The taking of jurisdiction by the Supreme Court is dependent not upon intricate propositions of law or complicated questions of fact, but upon questions of the violation of simple human rights guaranteed by the Constitution—rights like that to be represented by counsel in capital criminal trials, or to refuse to salute the American flag in schools, etc. The rights here violated are perhaps less colorful, but equally fundamental.

While we have shown that the Florida Supreme Court incorrectly applied the law of contracts (R. 248), we do not predicate jurisdiction upon questions of fact nor upon rulings of the state courts as to contractual rights. The record shows that the consideration for the release was explicitly recited therein (R. 166). It consisted on the respondents' side of the return of $10,000 plus the cancellation of the first agreement, and on the petitioners' side of the cancellation. The consideration for the second agreement on the petitioners' side consisted of a promise to deliver stock conditional upon payment and promise to discuss voting trust, and on the respondents' side consisted of execution of the release.*

If the second contract were the sole agreement, there might be some justification for the ruling, but respondents had received consideration for execution of the release and for the promise contained in the second contract, namely that of the act of petitioners in returning the $10,000 deposit. The ignored release, therefore, was effective, even though the second contract failed. The same courts cannot permit extrinsic evidence as to consideration for the release other than what is expressed therein, and then firmly reject extrinsic evidence as to voting control in the first agreement, even though it was offered in support of a fraud defense. However, the application to the United States Supreme Court is predicated not upon wrong construction or error of law but upon the basic reasons stated in the original brief in the form of the seven questions presented.

Regardless of the right or wrong ruling by the state courts there was a failure to observe the procedural requirements of due process of law, and there was a violation of the rights guaranteed by the fourteenth amendment to

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* The English language is called upon to serve a queer purpose when a formal unconditional release of unquestioned validity is referred to as a "receipt" and it is said that the purpose and effect of the release has been destroyed by judicial "construction", i. e., a process in which the release was ignored.

the United States Constitution. That is the real basis of the petition for certiorari here presented, despite the attempt in the opposing brief to confuse by mis-statements and distortions of the facts and of the questions below.**

(1) Is There Merit to Contention That Petition for Certiorari Not Timely Filed?

On the coming down of the mandate on the first appeal the litigation was in no sense terminated. Questions that had previously been raised had not been disposed of. New federal questions could, and did, arise, by reason of the final decree which the Circuit Judge formulated and entered.

It was for the Circuit Judge to determine the kind and character of the final decree to be entered. He could have entered a decree that the parties "bargain" further as to the voting trust agreement. Respondents might have "elected" to so bargain to purchase 300,000 shares of the stock, and might have been unable to raise funds for the purchase of 440,000 shares thereof.

The conditions that might have been imposed in the decree could have caused the respondents as optionees, to be willing to drop the litigation. Their investment at the time was nil.

If a final decree had been entered as to the second option by reason of an election of the optionees, it is likely that no federal question would have arisen or would have been presented herein.

If following the first appeal by respondents to the Florida Supreme Court petitioners had applied here for certiorari they properly would have been told in the language of

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** Respondents have asserted that the Florida Supreme Court heard argument from counsel for both sides on the appeal from the decree of November 15, 1951 (R. 252-253). The statement is based on pure imagination. The Supreme Court of Florida at no time heard the appeal of petitioners. The errors committed against petitioners, as defendants, were never heard or reviewed. The appeal was dismissed immediately upon being docketed, as we have heretofore shown.

Grays Harbor Logging Co. v. *Coats-Fordney Co.*, 243 U.S. 251, 37 S. Ct. 295, 61 L. Ed. 702, that:

> "When the litigation in the state courts is brought to a conclusion, the case may be brought here upon the federal questions already raised as well as any that may be raised hereafter; for although the state courts, in the proceedings still to be taken, presumably will feel themselves bound by the decision heretofore made by the supreme court (82 Wash. 503), as laying down the law of the case, this court will not be thus bound. United States v. Denver & R. G. R. Co. 191 U.S. 84, 93, 48 L. ed. 106, 109, 24 Sup. Ct. Rep. 33; Messenger v. Anderson, 225 U.S. 436, 444, 56 L. ed. 1152, 1156, 32 Sup. Ct. Rep. 739; Coe v. Armour Fertilizer Works, 237 U.S. 413, 418, 59 L. ed. 1027, 1029, 35 Sup. Ct. Rep. 625."

A state court judgment is lacking in finality even where it compels *certain* action to be taken but offers various alternative ways to comply, some of which might involve further administrative and judicial proceedings. *Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62, 68 S. Ct. 972, 92 L. Ed. 1212.

Unless the precise alternative has been selected and given effect, the Court cannot be certain how the litigant will be affected by the judgment, even though the federal issues might have been *substantially* identical whatever alternative is chosen. Id.

The fact that the highest state court in the second appeal refuses to consider or reconsider the federal issues presented or sought to be presented in the first appeal does not deprive the Supreme Court of jurisdiction to review the second judgment. Otherwise the normal and orderly process of review will be frustrated and the litigant will lose all chance for Supreme Court scrutiny of his federal rights. *Great Western Teleg. Co.* v. *Burnham*, 162 U.S. 339, 16 Sup. Ct. 850, 40 L. Ed. 991; *Louisiana Nav. Co.* v. *Oyster Commission*, 226 U.S. 99, 33 Sup. Ct. 78, 57 L. Ed.

138; *Urie* v. *Thompson*, 337 U.S. 163, 172-3, 69 Sup. Ct. 1018, 93 L. Ed. 1282.

It is submitted that the federal questions which had their origin in the Florida Supreme Court order of November 6, 1951 (R. 222) and those arising under later orders (R. 252, 273, 278, 307, and 328), while this litigation was being brought to a conclusion in the state court, were brought here at the earliest time possible under Title 28, Section 1257 (3), U.S.C. Review on a piecemeal basis by certiorari is neither permitted nor desirable. Respondents' contentions to the contrary appear to be without merit.

(2) Did Petitioners Voluntarily Comply With the Decree by Producing 431,442 Shares of the Stock?

There was no voluntary compliance. There is a contention to the contrary here made by respondents, of course, but the voluminous record belies this.

Petitioners raised the question and informed the Circuit Judge of the "short sale" feature of the case through the motion to dismiss the complaint, which was denied. It was wrongfully ruled out of the case then. Afterward, at hearing on our petition for procedural order (R. 239), which was denied, it was ruled out again. Previously, at the pretrial conference and at trial it had been ruled out. Respondents had been relieved of proving ownership. Streit knew when the first option was made and he and Wallace knew at the time of the second option that a "short sale" was being made.

After the first appeal, when petitioners repeatedly undertook to raise the ownership question they were summarily shut-off by the Circuit Judge saying "All that I want to know is whether you are going to produce the stock or not". There was apparent at all times outright approval to use the legal machinery of the Court for illegal purposes, namely, coercion of other stockholders.

The final decree of November 15, 1951 (R. 252), was entered with knowledge of the fact that specific per-

formance of a "short sale" was being enforced and that petitioners did not own the stock. That decree was entered with a threat of commitment for contempt for non-compliance as has been shown in our petition and first brief. See in addition the Miami Herald news article (R. 305), particularly the fourth paragraph thereof (second par. on p. 306).

(3) As to the Contention of Agency-Sheer Imagination as a Substitute for Due Process of Law.

Being confronted with the "short sale" character of the stock transaction, respondents here, for the first time, rely upon a purported agency between petitioners and the other owners of stock. In so doing, they resort to sheer imagination, basing their assertions upon the existence of family relationships, between some of the parties, having nothing more substantial upon which to dwell.*

As we have undertaken to point out in this case in various ways, a "short sale" of stock is obviously not subject to specific performance, as respondents certainly have known. Therefore, if respondents had believed that there is merit to their contentions as to agency, why were the "third-party" owners not named as defendants, in order that the issue of agency might be determined by due process of law? Why have respondents avoided and successfully circumvented that issue at every stage of the proceedings below? How is it to be held that petitioners and the absent (third-party) owners are to be bound with respect to questions which have not been litigated; as to which they

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* This contention points up the inaccuracy of respondents' blanket assertions that all of petitioners' defenses were considered. As a glaring example we mention the defense of fraud on the part of the optionee in the procurement of the first, and afterward released option. Due to a flagrantly obvious misconception as to the nature of that defense, it was ruled out entirely by the Circuit Judge and the Florida Supreme Court afterward denied petitioners' review on appeal. They were in fact denied the right to review at all stages of the proceedings, as has been shown.

have not had their day in court; and as to which the state courts have denied them even an opportunity to be heard? We respectfully refer to the discussion of our questions III-B, IV and V, in petitioners' main brief.

The unlitigated and until now disregarded "agency" issue has been relegated to a position similar to that of the release. When the release was executed it was the purpose and intent of the parties, as the document shows, to terminate, rescind and discharge their prior mutual obligations then in dispute, *and to get off to a fresh start.* Petitioners (members of the "Maule family") knew of the block of 200,000 shares of the stock obtainable from an outsider, and were willing to assume, under the stated conditions, the duty of delivering, *for the voting trust,* the number of shares called for. But no agency was involved, and we respectfully submit that a solution to the "due process problems" presented here is not to be found, correctly and justly, in such a device. There is here no more of "agency" than there is in other short sales of securities.

(4) Does Not the Question Arise: Whether the Bases of Fact Upon Which the State Courts Rested Their Decisions Denying the Asserted Federal Rights Have Any Support in the Record; for If Not, It Is the Duty of the Supreme Court to Review and Correct.

Respondents, for all of their adroitness, have presented no satisfactory answer to the foregoing. (See Petitioners' Question II). They have been unable to supply that which the record does not contain.

Respectfully submitted,

CLAUDE PEPPER,
Cafritz Building,
Washington 6, D. C.

W. G. WARD,
Dupont Building,
Miami 32, Florida.

T. J. BLACKWELL,
First Federal Building,
Miami 32, Florida.

Attorneys for Petitioners.